Petition

81-451

No. 81-

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

FAIR & MAYO
JAMES C. MAYO
(Counsel of Record)
P. O. Box 509
Louisville, Mississippi 39339
DERAMUS, LEWIS & TUCKER
FRANK M. DERAMUS
P. O. Box 532
Louisville, Mississippi 39339
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State Supreme Court can order non compliance with the Federal Voters Rights Act of 1965 as Amended, Sec. 5, 42 U.S.C.A. Sec. 1973 c.

PARTIES TO THE PROCEEDING

Petitioners:

Ralph Hathorn, Mayor, City of Louisville
Charles Lawrence, City Clerk
Robert E. Clark, Jr., Alderman
Mike Cournoyer, Alderman
Andy Woods, Alderman
Bobby McWhirter, Alderman
Giles Ward, Alderman
City of Louisville, MS, a Municipal Corporation
Thomas W. Saterfiel, Superintendent, Louisville Municipal Separate School District
Paul Younger, Trustee
Kenny Morris, Trustee
Jerry Kemp, Trustee
Veterine Williams, Trustee
Mike Frazier, Trustee

Respondents:

Sammy Carter
Joe Goodin
Mrs. Bobby Lovorn
J. D. Eaves
Prentiss Carter

TABLE OF CONTENTS

Questions Presented for Review I
Parties to the Proceeding II
Table of Contents III
Table of Authorities III
Opinion Below 1
Jurisdiction 1
Statutes Involved 2
Statement of the Case 2
Reasons for Granting the Writ 3
Conclusion 6

Appendix—

"A" Decision of the Supreme Court of Mississippi A1

"B" Federal Voters Rights Act of 1965 as Amended, Sec. 5, 42 U.S.C.A. Sec. 1973 c A6

"C" Legally unenforceable Letter from Attorney General of United States dated March 28, 1980 ..... A7

Table of Authorities

Atlantic Coastline R. Co. v. Powe, 283 U.S. 401, 51 S.Ct. 498 6

Lovorn v. Hathorn, 365 So.2d 947 (Miss. 1979), Cert. denied, 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979) 2

McDaniel, et al. v. Sanchez, et al., 101 S.Ct. 2224 (1981) 4, 6

Perkins v. Matthews, 91 S.Ct. 431 (1971) 5

Mississippi Code of 1972, Sec. 37-7-203 5

42 U.S.C. Sec. 1973 c 2

Voting Rights Act of 1965, as Amended, Sec. 5 .....3, 4, 5, 6

No. 81-

In the Supreme Court of the United States

October Term, 1981

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Mississippi rendered on June 3, 1981.

OPINION BELOW

The decision of the Supreme Court of Mississippi is reported at 399 So.2d 1356 and is appended hereto as Appendix "A".

JURISDICTION

The decision of the Supreme Court of Mississippi was entered on June 3, 1981, and Rehearing denied on July 8, 1981. This Court's Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257 (3).

STATUTES INVOLVED

Voting Rights Act of 1965, as Amended, Sec. 5, 42 U.S.C.A. Sec. 1973 c and is appended hereto as Appendix "B".

STATEMENT OF THE CASE

Since 1960, the Board of Trustees of the Louisville Municipal Separate School District has embraced the entire County of Winston and is composed of five (5) members: Three (3) appointed by the governing authorities of the City of Louisville and two (2) elected by the qualified electors outside the City.

Respondents sued the Petitioners in the Chancery Court of Winston County, Mississippi, seeking to change the method and manner of the selection of Trustees for the school district and after the Chancellor dismissed Respondents' initial complaint, the cause was appealed to the Mississippi Supreme Court and a decision handed down ordering the change in the Trustees election on January 10, 1979 in the case of *Lovorn v. Hathorn,* 365 So.2d 947 (Miss. 1979), Cert. denied, 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979).

On July 24, 1979, the Chancery Court of Winston County, pursuant to the mandate of the Mississippi Supreme Court, outlined the election procedure. However, the Chancellor ordered that the election procedures as decreed be submitted either to the United States Attorney General or the United States District Court for the District of Columbia in accordance with 42 U.S.C. Sec. 1973 c. After additional data was forwarded to the United States Department of Justice, the Civil Rights Division of the United States Attorney General's office advised the Appel-

lees in a letter, dated March 28, 1980, that it objected to the change in the election procedure and advised the Petitioners that the changes in the election procedure were legally unenforceable, a copy of said letter from the United States Attorney General is appended hereto as Appendix "C".

After additional hearings, the Chancery Court of Winston County, Mississippi, on September 30, 1980, decreed that the election would remain in force subject to compliance with the 1965 Voting Rights Act and postponed the election.

Respondents appealed the decision of the Chancellor to the Mississippi Supreme Court and the Court reversed the Chancellor which made the election subject to compliance with the Federal Voters' Rights Act. On July 8, 1981, the Supreme Court of Mississippi denied the Petition for Rehearing.

The Supreme Court remanded the case to the Chancellor directing him to conduct the election without regard to the Voting Rights Act of 1965. On August 4, 1981, the Chancery Court of Winston County, Mississippi, decreed that the election must be held and ordered Respondents to disregard the legally unenforceable letter of the Attorney General of the United States dated March 28, 1980, and to otherwise ignore Section 5 of the Voting Rights Act.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted since the mandate of the Supreme Court of Mississippi requires the Chancery Court to order the Petitioners to conduct an election and violate Section 5 of the Voting Rights Act of 1965, as Amended, even though the Attorney Gen-

eral of the United States has, through its letter of March 28, 1980, which is attached as Appendix "C", advised the Petitioners that the change in election procedures and previous Orders of the Court were legally unenforceable.

On June 1, 1981, the Supreme Court of the United States in Number 80-180 *McDaniel, et al. v. Sanchez, et al.*, 101 S.Ct. 2224 (1981), in construing a Commissioner's Reapportionment Plan from Kleberg County, Texas, and affirming the Fifth Circuit Court of Appeals, 615 F.2d 1023, held that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited choices available to them—the preclearance requirement of the Voting Rights Act is applicable even though the Federal District Court had acted upon the proposed plan before it had been submitted to the Attorney General or the United States District Court for the District of Columbia for preclearance. Even though the Federal District Court had approved and ordered the redistricting, the Supreme Court of the United States in *McDaniel, et al.*, says that preclearance is required in Court ordered reapportionment.

The pertinent part of the Voting Rights Act as enacted in 1965 as Amended in 1975 in Section 5 is attached as Appendix "B" and we respectfully submit that in the opening portion of the attached Appendix "B", where reference is made to a state or political subdivision, it is applicable to all branches of the state government and its political subdivisions and would include State Supreme Court ordered changes or efforts to administer changes by the legislative, executive and judicial branches of state government; therefore, the Supreme Court of Mississippi is without legal authority to mandate Petitioners to disobey

the Voting Rights Act and the Attorney General of the United States.

Even though the legislature of the State of Mississippi amended Section 37-7-203 prior to 1965, the Respondents acting through the State Courts seek to administer a change in the method and manner of the election procedures of the Louisville Municipal Separate School District. The *McDaniel* decision cites *Perkins v. Matthews,* 91 S.Ct. 431 (1971) which holds that any change in voting procedures for the City of Canton was within the meaning of Section 5, Voting Rights Act, required compliance with same before implementing the change in the election procedures. In the *Perkins v. Matthews* case, the legislature had changed the law for the election of Aldermen prior to the enactment of Section 5, but Canton did not attempt to change its voting procedures and comply with the new state law until after the enactment of Section 5 and the Supreme Court of the United States in *Perkins* made Section 5 applicable when any covered jurisdiction seeks to administer voting changes.

We submit that the changes sought in the election of the Trustees of the Louisville Municipal Separate School District are squarely covered by *McDaniel* and Section 5 in that the legislature changed the law as to county-wide municipal school districts and after the enactment of the Act within a covered jurisdiction a state court and the Respondents are seeking to administer a change. The change has been disapproved by the Attorney General of the United States with full knowledge of the Orders of the Chancery Court of Winston County and the decision of the Mississippi Supreme Court. Since the Attorney General has considered the submission and denied the change, we must assume that the Attorney General of the United States by his act considers the Justice Depart-

ment to have jurisdiction within the meaning of Section 5 and acted accordingly. It is interesting to note that even the Federal Courts cannot waive the preclearance requirement of Section 5 as mandated in *McDaniel.*

An inference is made from the decision of the Supreme Court of Mississippi that since the United States Supreme Court denied certiorari of No. 49,446, this Court can consider the denial an adjudication on the merits that there are no requirements for preclearance under the Voting Rights Act. We respectfully submit that a denial of Certiorari is not and has never been an adjudication on the merits and the mere fact that the United States Supreme Court declined to reverse or alter in any respect the prior decision of this Court is not controlling on the merits of the Section 5 preclearance. Denial of Writ of Certiorari imports no expression of opinion upon the merits of the case. *Atlantic Coastline R. Co. v. Powe,* 283 U.S. 401, 51 S.Ct. 498.

CONCLUSION

Petitioners suggest that the Writ should issue since the Supreme Court of Mississippi has ordered the Petitioners to violate Section 5 of the Voting Rights Act and to disobey the legally unenforceable letter of March 28, 1980, from the Attorney General of the United States. This Honorable Court has to decide an important question of federal law as to whether or not the Supreme Court of the State of Mississippi can order noncompliance with the Voting Rights Act.

We submit to the Court that unless this Court issues the prayed for Writ of Certiorari and settles the important question involved, the Petitioners will be placed in an untenable position of either the disobeyance of the mandate

of the Supreme Court of Mississippi or violation of a Federal statute and the Attorney General of the United States. The Chancery Court of Winston County has entered a Decree requiring the Petitioners "to administer" a voting practice or procedure different from that which existed as of November 1, 1964, when the Attorney General of the United States has already denied approval of the requested change.

For the aforementioned reasons, Petitioners are of the opinion that the Writ of Certiorari should be granted and that the question herein involved should be decided by this Court as guidance for actions to be taken by governmental units in the covered states.

Respectfully submitted,

FAIR & MAYO
JAMES C. MAYO
(Counsel of Record)
P. O. Box 509
Louisville, Mississippi 39339
DERAMUS, LEWIS & TUCKER
FRANK M. DERAMUS
P. O. Box 532
Louisville, Mississippi 39339
Attorneys for Petitioners

Appendix

APPENDIX "A"

Sammy CARTER, et al.

v.

Mrs. Curtis LUKE, et al.

No. 52758.

Supreme Court of Mississippi.

June 3, 1981.

Rehearing Denied July 8, 1981.

Petitioners, who sought to enforce court mandate concerning election of school board trustees, appealed from judgment of the Chancery Court, Winston County, John C. Love, Jr., J., Chancellor, which set forth conditions under which the election was to be held. The Supreme Court, Broom, J., held that the election was to be held pursuant to Mississippi statute and was not required to comply with the federal voters rights act.

Affirmed in part and reversed in part.

Schools (Key) 53(1)

Election of school board trustees was to be held pursuant to Mississippi statute and was not required to comply with the federal voters rights act. Code 1973, § 37-7-203; Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

Laurel G. Weir, Thomas L. Booker, Philadelphia, for appellants.

James C. Mayo, Fair & Mayo, Deramus, Lewis & Tucker, Louisville, for appellees.

Before SMITH, WALKER and BROOM, JJ.

BROOM, Justice, for the court:

Election of school board trustees of the countywide Louisville Municipal Separate School District is highlighted by this case appealed for the second time from the Chancery Court of Winston County. There the petitioners Mrs. Bobbie Lovorn, Joe Goodin, J. D. Eaves, Prentiss Carter, and Sammy Carter (appellants herein) petitioned the court to order a trustees election and for other relief. *Lovorn v. Hathorn,* 365 So.2d 947 (Miss.1979) held unconstitutional the phrase in Mississippi Code Annotated § 37-7-203 (Supp.1980) "in which Highways 14 and 15 intersect" and remanded the case for election of one school board trustee from each supervisor's district. The United States Supreme Court denied petitioner's writ of certiorari. *See Lovorn v. Hathorn, supra,* cert. denied, 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979). The lower court decreed that Mississippi Code Annotated § 37-7-217 (Supp. 1980) required a run-off election if none of the trustee-candidates from a particular supervisor's district received a majority vote. In addition, the lower court ordered that the election procedure was subject to the Voting Rights Act of 1965.

Since 1960, the school district has included all of Winston County. The board of trustees was composed of five members: three appointed by the governing authorities of the City of Louisville and two elected by qualified electors outside the city. Appellants sued the city's mayor and others to enforce the election of one trustee from each of the county's five supervisor districts. Although the chancellor dismissed appellant's initial complaint, we reversed and remanded the case to the chancellor for further proceedings in *Lovorn, supra.*

Complainants filed their petition to enforce the mandate of this Court on June 18, 1979, and Chancellor Love heard and sustained the petition on July 3, 1979. This cause was first filed in the United States District Court for the Northern District of Mississippi which kept the case on its docket but allowed it to be litigated in the state court. After this Court reversed and remanded the cause, the District Court, on defendant's motion, dismissed the complaint.

A detailed decree of the chancellor dated July 24, 1979, outlined the election procedure. One trustee was to be elected from each supervisor's district, and their terms were to expire in different years as per Mississippi Code Annotated § 37-7-203 (1972). According to the decree, if no trustee-candidate received a majority, there would be a run-off election between the two candidates receiving the highest number of votes. The chancellor ordered that the election procedures as decreed be submitted either to the United States Attorney General or the United States District Court for the District of Columbia in accordance with 42 U.S.C. § 1973c. After additional data was forwarded to the United States Department of Justice, the Civil Rights Division of the United States Attorney General's office advised the appellees in a letter dated March 28, 1980, that it objected to the majority vote run-off requirement. The office advised them that they had the right to seek a declaratory judgment from the United States District Court for the District of Columbia.

After additional hearings, the chancellor overruled appellants' motion to require the United States Attorney General to be made a party; no authority was cited to support the motion. The lower court decreed: (1) Mississippi Code Annotated § 37-7-217 (Supp.1980) requires a majority vote on "run-off" election, (2) the United

States Attorney General would not be made a party defendant, (3) the court would not affirmatively order the attorney general to approve the election procedure, and (4) the decree calling the election would remain in force subject to compliance with the 1965 Voting Rights Act.

Appellants raise only one assignment of error:

> The chancellor erred in not obeying the mandate of the Mississippi Supreme Court and mandate of the United States Supreme Court and provide for an election as mandated.

When we entered our prior opinion and mandate in this cause, judgment was rendered here for the appellants. The cause was remanded for "further proceedings" pursuant to our opinion, and in that posture the lower court was required to call an election pursuant to § 37-7-203, *supra,* which code section was before us on the appeal here and was also before the United States Supreme Court which denied certiorari. 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049, *supra.* After the United States Supreme Court denied certiorari the chancellor by decree dated July 24, 1979, ordered an election but required that the matter be submitted to the Attorney General of the United States for approval "in compliance with 42 U.S.C. sec. 1973c." Subsequently the lower court postponed the election and then by decree dated September 30, 1980, among other things, decreed that certain other matters which had been raised were

> dismissed with the prior Order of this Court calling the election to remain in force subject to compliance with the Federal Voters Rights Act as previously ordered by this Court.

Our prior decision, which the United States Supreme Court declined to reverse or alter in any respect, became

and is the law of the case. The very code section, Mississippi Code Annotated § 37-7-203 (Supp.1980), central to our prior opinion, provides that the election shall be "in the same manner as is provided for the election of trustees of school districts other than municipal separate school districts having territory in two or more counties." The language just quoted refers to Mississippi Code Annotated § 37-7-217 (Supp.1980), which provides that a majority vote shall be required in such an election. On oral argument, both parties agreed to abide by the statutory scheme requiring a run-off election. We think the lower court acted properly and within the applicable statutes and law in entering the final decree appealed from except that part in numercial paragraph 4 thereof which made the election, which he had called, "subject to compliance with the Federal Voters Rights Act as previously ordered by this Court." Accordingly, the decree of the lower court appealed from is reversed as to that part of the decree requiring "compliance with the Federal Voters Rights Act. . . ." In all other respects the decree is affirmed, and the cause is remanded with directions for the lower court to call and require the holding of an election pursuant to § 37-7-203, *supra*, and not inconsistent with this opinion.

REVERSED AS TO REQUIREMENT IMPOSED BY THE CHANCELLOR THAT THE MATTER AGAIN BE SUBMITTED TO THE UNITED STATES ATTORNEY GENERAL OR A FEDERAL DISTRICT COURT; AFFIRMED IN ALL OTHER RESPECTS.

PATTERSON, C. J., SMITH and ROBERTSON, P. JJ., and SUGG, WALKER, LEE, BOWLING and HAWKINS, JJ., concur.

APPENDIX "B"

The Voting Rights Act as enacted in 1965 as amended in 1975 in Section 5 provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or pre-requisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: PROVIDED, That such qaulification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made."

APPENDIX "C"

U.S. DEPARTMENT OF JUSTICE
Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

James C. Mayo, Esq.
Fair and Mayo
Post Office Box 509
Louisville, Mississippi 39389

Dear Mr. Mayo:

This is in reference to the changes in election procedures for the Board of Trustees of the Louisville Municipal Separate School District in Winston County, Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on January 28, 1980.

At the outset, we note that our analysis has revealed no other situation in Mississippi where a county-wide school district is operated as a municipal separate school district as in Winston County. To the contrary, our analysis shows that all other county-wide school districts in Mississippi are operated by county school boards which are, by Mississippi law, elected from the five county supervisor beats or districts in each county. As in most other elections in Mississippi, candidates may win in the general election by obtaining a plurality of the votes cast.

As we understand it, however, and because the county-wide school authority in Winston County is termed a municipal separate school district, a majority vote run-off requirement will apply to the election of school board members even though they will be elected from the county's

five supervisor's districts. Thus, in spite of the fact that the only apparent difference between the Winston County-wide school authority and that of other counties is its name, in Winston County a majority vote requirement would be imposed as a unique feature among county-wide school board elections in the state.

In this regard, our analysis further has shown that blacks constitute approximately 39 percent of the county's population but do not constitute a majority of any of the five supervisor's districts from which school board members will be elected in Winston County. Additionally, there appears to be a general pattern of racially polarized voting in the county and no black has ever been elected or appointed to the school board, the board of supervisors or the Louisville Board of Aldermen. Because of these facts, we are unable to conclude, as we must under the Voting Rights Act, that the special application of a majority vote requirement for the election of county-wide school board members in Winston County will not have a discriminatory effect. Accordingly, on behalf of the Attorney General, I must enter an objection to the method of electing the Louisville Municipal Separate School District board of trustees insofar as it incorporates a majority vote requirement.

Of course, as provided by Section 5 of the Voting Rights Act you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (28 C.F.R. 51.21(b) and (c), 51.23, and 51.24) permit you to request the Attorney General to reconsider the objection. However, until the objection is

withdrawn or the judgment from the District of Columbia Court obtained, the effect of the objection by the Attorney General is to make the changes in election procedures legally unenforceable.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter of the course of action the Louisville Municipal Separate School District plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Mr. Andrew Karron (202—724-7403) of our staff, who has been assigned to handle this submission.

Because of the pendency of the related case of *Lovorn v. Hathorn*, No. 49446, we are forwarding a copy of this letter to the Chancery Court.

Sincerely,

/s/ Drew S. Days III
Drew S. Days III
Assistant Attorney General
Civil Rights Division

Appendix

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-451

In the Supreme Court of the United States

October Term, 1981

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

JOINT APPENDIX

JAMES C. MAYO
FAIR & MAYO, Attorneys
P. O. Box 509
Louisville, Mississippi 39339
(601) 773-3455

FRANK M. DERAMUS
DERAMUS, LEWIS & TUCKER
P. O. Box 532
Louisville, Mississippi 39339
(601) 773-9254
Counsel for Petitioners

LAUREL G. WEIR
Attorney at Law
P. O. Box 156
Philadelphia, Mississippi 39350
(601) 656-1931
Counsel for Respondents

Petition for Certiorari Filed August 28, 1981.
Certiorari Granted December 14, 1981.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Relevant Docket Entries 1

Petition to Enforce Mandate of Mississippi Supreme Court and Other Relief 2

Opinion in Cause No. 49,446 6

Order of the Supreme Court of the United States Denying Certiorari in Cause No. 78-1517 19

Petition to Modify and Change Decree and Other Relief 20

Final Decree of the Chancery Court of Winston County dated September 30, 1980 25

The following documents appear in the Appendix of the Petition for Certiorari filed in this case August 28, 1981. The referenced page numbers are those of the Appendix in the Petition:

Opinion of the Supreme Court of Mississippi in Cause No. 52,758 dated June 3, 1981 ..... A1-A5

Letter from United States Department of Justice, Civil Rights Division, dated March 28, 1980 ..... A7-A9

No. 81-451

In the Supreme Court of the United States

October Term, 1981

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

6/18/79	Petition to Enforce Mandate
7/2/79	Answer of Defendants
7/3/79	Hearing on Petition to Enforce Mandate
7/24/79	Decree of the Chancery Court Ordering Election
8/22/79	Decree of the Chancery Court Amending Prior Decree
10/1/79	Decree of the Chancery Court Postponing Trustee Election
5/16/80	Plaintiffs' Petition to Modify
6/11/80	Answer of Defendants to Petition to Modify
9/10/80	Hearing on Motion
9/30/80	Final Decree of Chancery Court
6/3/81	Decision of Mississippi Supreme Court

(Filed June 18, 1979)

CHANCERY COURT WINSTON COUNTY, MISSISSIPPI

NO. 11,222

SAMMY CARTER, ET AL
COMPLAINANTS

VS.

MRS. CURTIS LUKE, ET AL
DEFENDANTS

PETITION TO ENFORCE MANDATE OF MISSISSIPPI SUPREME COURT AND OTHER RELIEF

TO THE HONORABLE CHANCERY COURT OF WINSTON COUNTY, MISSISSIPPI:

Comes the adult petitioners or the original petitioners in this cause, Mrs. Bobbie Lovorn, of District 1, Winston County, Mississippi, Joe Goodin of District 2, Winston County, J. D. Eaves of District 3, Winston County, Prentiss Carter of District 4 of Winston County, Mississippi, and Sammy Carter of District 5, Winston County, Mississippi, and all live outside the municipal limits of Louisville, Mississippi, in the Louisville Municipal Separate School District of Winston County, Mississippi, and this matter was heard by the Mississippi Supreme Court and said court entered their final opinion on April 9, 1979, as shown by a true and correct copy of their opinion and mandate which is hereto attached and made a part of this petition just as if copied fully in words and figures herein.

2. The same circumstances exist now as existed at the time of the filing and trial of the original case in this court, with the exception that Harold Smith is no longer Alderman of Louisville, Mississippi, and instead Bobby

McQuitar has taken his place as Alderman in Louisville, Mississippi; and Louis Taunton is no longer Alderman in Louisville and instead Mrs. Lamont Cunningham has taken his place. Mrs. Curtis Luke is no longer City Clerk of Louisville and instead Charles Lowery is the City Clerk. The petitioners bring forth all of the pleadings and things of record in this cause by reference just as if copied fully in words and figures herein, that are necessary for the enforcement of the mandate of the Mississippi Supreme Court.

3. By virtue of the mandate and opinion of the Mississippi Supreme Court, there is required to be an election conducted in each Supervisor district in Winston County, Mississippi consisting of a total of five supervisor districts for the election of a County Board of Education with one trustee to be elected from each supervisor's district. The election should be conducted at each and every polling place as soon as possible for the election of trustees. The persons who claim to be trustees and acting under their direction and control, should be ordered to vacate their alleged positions and from further carrying out of their alleged duties. The Honorable Election Commissioners of Winston County, Mississippi, should be required to conduct the election in accordance with the laws of the State of Mississippi for members of the Winston County Board of Education as soon as possible. One trustee shall be elected from each supervisor's district at all of the polling places as provided by law. It is submitted that all parties are already before the court and are duty bound to appear in court and honor and obey the decree of this Court to be rendered to enforce said mandate. However, if the court requires a setting and for the parties to be summoned, the petitioners stand ready to do whatever is necessary to enforce said mandate. Defendants have acted vexatiously and without merit and have intentionally harassed appel-

lants and their attorney in order to defeat the enforcement of the laws of the State of Mississippi, even undertaking to appeal or apply for a Writ of Certiorari to the United States Supreme Court when there was not merit at all to such tactics and still trying to delay and frustrate justice in this matter. The decision of the United States Supreme Court is also attached and made a part of this petition. Defendants should be required to pay reasonable attorney fees in this matter because of the extra attorney fees they have caused appellants and petitioners to endure and incur and even now they will not and have not obeyed the mandate of the Mississippi Supreme Court and are undertaking to flout same.

4. Defendant Thomas W. Satterfield, acting as Superintendent under the direction of the other alleged trustees, Davis Fair, Vernon Scott, Paul Rounger, Everette Watkins, and William Billy Lipscand have during the past six years unlawfully disposed of more than $6,000,000.00 (Six Million dollars) in funds belonging to the School District involved, without authority of law, and should be required to make an accounting for said exact amount of money unlawfully misspent and file an acounting with the court for said purposes so that the court can determine the exact amount of misspent money without authority of law and enter judgment against them for said amounts. However, this proceeding should not keep the mandate from being enforced immediately and an Order providing for same should be entered immediately without the necessity of passing on such proposition at the same time, due to the urgency of the situation and the necessity of making arrangement to conduct school as soon as possible.

PREMISES CONSIDERED, PETITIONERS PRAY that this petition be filed and docketed, and an Order immediately entered setting the time, date, and place of the

election and making provisions for same, and require the alleged acting trustees of the Louisville Municipal School District to stop undertaking to be trustees and to quit undertaking to operate said school district and from interfering in any way or manner the trustees to be elected in the election scheduled from the proper operation of the school district; and if necessary to make provisions for a setting of this cause and for the issuance of necessary process if the court requires, and also after the election is conducted and the new trustees have taken office, to hear the matter further on the merits to determine the amount of money the said alleged trustees and superintendent have unlawfully misspent and for the payment of said money back into the funds of the school district and enter judgment against them jointly and severally for the amount found due and owing after they have been required to file an accounting for their acts, deeds, and money misspent and enjoin the wrongful withholding of the record of said school district and property and possessions from the newly elected trustees; and petitioners pray for the same relief temporarily and for the same relief under urgent and necessitous circumstances and pray for all other relief as they may be entitled to receive under the law and equity and as in duty bound they will ever pray.

MRS. BOBBY LOVORN, JOE GOODIN, J. D. EAVES, PRENTISS CARTER AND SAMMY CARTER, ALL BY THEIR ATTORNEY, LAUREL G. WEIR, Box 156, Philadelphia, Mississippi 39350.

/s/ Laurel G. Weir

(Affidavit and Certificate of Service are omitted in printing)

OPINION IN 49,446

Mrs. Bobby LOVORN, Sammy Carter, Joe Goodin, J. D. Eaves and Prentiss Carter

v.

Ralph HATHORN, Mayor of Louisville, et al.

No. 49446.

Supreme Court of Mississippi.
Oct. 4, 1978.

As Corrected On Denial of Rehearing
Jan. 10, 1979.

Action was brought against mayor and others seeking mandatory injunction to enforce election of five-member school board for municipal separate school district. The Chancery Court, Winston County, John C. Love, Jr., Chancellor, dismissed bill of complaint, and complainants appealed. The Supreme Court, Lee, J., held that provision of statute governing election of board of trustees in school district embracing entire county which read "in which Highways 14 and 15 intersect" was unconstitutional, although remaining portion of statute was constitutional as being rational and germane to subject matter.

Reversed, rendered and remanded.

Statutes (Key) 64(2), 96(4)

Portion of statute providing for election of board of trustees for school district embracing entire county which read "in which highways 14 and 15 intersect" was unconstitutional as violation of prohibition on local, private or special laws; however, with offending language stricken,

remaining portion of statute was constitutional as being rational and germane to subject matter. Code 1972, § 37-7-203; Const.1980, § 90(p).

Laurel G. Weir, Philadelphia, for appellants.

Fair & Mayo, James Mayo, Louisville, William A. Allain, Jackson, Frank Deramus, Louisville, for appellees.

Sara E. Gallaspy, Jackson, amicus curiae brief for Mississippi Municipal Association.

En Banc.

LEE, Justice, for the Court:

Mrs. Bobby Lovorn, et al., filed their bill of complaint against Ralph Hathorn, Mayor of Louisville, et al., in the Chancery Court of Winston County, seeking a mandatory injunction to enforce the election of a five-member school board for the Louisville Municipal Separate School District. The chancellor entered a decree dismissing the bill and complainants below appeal and assign the following errors in the trial:

(1) The chancellor erred in holding Mississippi Code Annotated Section 37-7-203 (1972) to be unconstitutional.

(2) The chancellor erred in holding that the constitutional rights of appellant were not being violated under the one-man one-vote principle.

(3) The chancellor erred in amending his decree after an appeal had been perfected to the Mississippi Supreme Court.

Since July 1, 1960, Louisville Municipal Separate School District has covered all of Winston County and has been the only school district in said county. Twenty-six hundred seventy-five (2,675) pupils outside the Louis-

ville city limits and fourteen hundred eighteen (1,418) pupils inside the city limits attend the schools of said district. The population of Winston County is approximately eighteen thousand four hundred six (18,406) of which number approximately seven thousand (7,000) live within the City of Louisville. Taxes in the school district are assessed and collected by the Louisville City Tax Assessor and Collector, and the school district has issued negotiable bonds for the purpose of funding construction and maintenance of the schools. School taxes collected inside the city amount to two hundred ninety-four thousand nine hundred sixty-four dollars three cents ($294,964.03) and said taxes collected outside the city amount to two hundred fifty-five thousand eight hundred twelve dollars twenty-four cents ($255,812.24). There are fifty-two (52) municipal separate school districts in Mississippi and at least forty-eight (48) such districts have territory located outside the municipality which is embraced within the school district.

Since 1960, the Board of Trustees of Louisville Municipal Separate School District has been composed of five (5) members, three (3) of which are appointed by the governing authorities of the City of Louisville, and two (2) of which are elected by the qualified electors of the school district outside the city. That part of Mississippi Code Annotated Section 37-7-203 (1972) as amended, which applies to this suit provides: ". . . in any county in which a municipal separate school district embraces the entire county *in which Highways 14 and 15 intersect*, one (1) trustee shall be elected from each supervisors district." (Emphasis added).

It is not disputed that the italicized phrase applies only to Winston County. Appellants' suit was brought to enforce election of one (1) trustee from each supervisor's

district. They also contend that the method of selecting trustees for said municipal separate school district violates the one-man one-vote rule and that the right of individuals residing outside the Louisville city limits to vote for trustees were being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The chancellor found the quoted part of the statute to be in violation of Section 90, Mississippi Constitution 1890, and unconstitutional. He also held that the one-man one-vote rule was inapplicable to the present case.

I.

Did the chancellor err in holding Mississippi Code Annotated Section 37-7-203 (1972), as amended, to be unconstitutional?

The basis of the chancellor's ruling is that the part of said statute referring to Highways 14 and 15 bears no rational relationship to the means of electing trustees in the school district, that it could not apply to any county except Winston County and that it is a local and private law in violation of Section 90(p), Mississippi Constitution 1890, which follows:

> "Section 90. The legislature shall not pass local, private or special laws in any of the following enumerated cases, but such matters shall be provided for only by general law, viz:
>
> * * *
>
> (p) Providing for the management or support of any private or common school, incorporating the same or granting such school any privileges; . . ."

We held in *Wilson v. Jones County Board of Supervisors*, 342 So.2d 1293 (Miss.1977), where the statute under

consideration involved levying an additional two-mill tax in a county having a population in excess of fifty-nine thousand five hundred forty (59,540) and being traversed by U. S. Highway 11 which intersected U. S. Highway 84 (Jones County), that the classification must bear a rational relationship to the purpose of the section. We said:

> "It is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect it would not have enacted the residue independently. [Citing cases].
>
> * * *
>
> . . . We are therefore led to the inescapable conclusion that the legislature would have enacted the valid part of the statute independently of the invalid part because this is precisely what it did. The invalid part of the statute may be separated from the valid part and stricken out leaving a complete and consistent plan whereby counties may levy additional taxes for general county purposes. We therefore hold that the part of section 27-39-304 authorizing counties to levy additional taxes for general county purposes, and the part in the last paragraph prescribing the procedure to be followed in making the levy, are constitutional." 342 So.2d at 1296, 1297.

An act providing that a county having two judicial districts and being intersected by U. S. Highway 84 and Interstate 59 was held to be unconstitutional in *Smith v. Transcontinental Gas Pipeline Corporation*, 310 So.2d 281

(Miss.1975). It was emphasized that the classification must be germane to the subject matter of the legislation.

In *Vardaman v. McBee*, 198 Miss. 251, 21 So.2d 661 (1945), the Court stated:

> "Class legislation, also often called local or private legislation, is legislation limited in operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory of the State, and statutes which make unreasonable or arbitrary classifications or discriminations violate provisions of Constitutions prohibiting special laws granting any special or exclusive privileges, immunities, or franchises, or passed for the benefit of individuals inconsistent with the general law of the land. 12 C.J., Sec. 855, p. 1128; 16A C.J.S. Constitutional Law § 489.
>
> It is said in Ruling Case Law, 'Where a law is broad enough to reach every portion of the state and to embrace within its provision every person or thing distinguished by characteristics sufficiently marked and important to make them clearly a class by themselves, it is not a special or local, but a general, law, even though there may be but one member of the class or one place on which it operates.' " 198 Miss. at 260, 21 So.2d at 664.

The statute under consideration in *Board of Education v. Educational Finance Commission*, 243 Miss. 782, 138 So.2d 912 (1962), provided:

> " 'In cases involving two (2) counties, each of which is organized on the county-unit basis, where the students residing in one county have been attending and wish to continue attending the school situated in the adjoining county which children from their community have been attending for more than forty (40) years

and where the county line lies within one thousand (1,000) yards of the school property, transfers may be granted for a period of time not to exceed five (5) years, subject to the approval of the two (2) respective county boards of education. In case the two (2) boards are unable to agree or in case there is a popular objection to the decision of the respective boards in the matter, appeals shall lie to the state educational finance commission whose decision shall be final.'" 243 Miss. at 804, 138 So.2d at 921.

In holding that the statute was not unconstitutional, the Court said:

"The appellant Benton County Board of Education has invited the attention of this Court to the Mississippi Legislative House Journal of 1960 at page 388 in order to prove that the amendment here complained of was introduced by three representatives from Marshall County, Mr. Ash, Mrs. Slayden and Mr. Owen. It is further stated that the Court should take judicial knowledge of the enactment and says: 'There can be no question, but that this proviso was inserted for the sole and express purpose of taking care of the Potts Camp situation.' This may well be true, but this Court has no right to assume such facts. The burden is upon one who attacks the constitutionality of a statute to show wherein it conflicts with the Constitution. We find the foregoing rule expressed in 11 Am.Jur., Constitutional Law, Sec. 132, p. 796, as follows: 'With regard to the duties cast upon the assailant of a legislative enactment, the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim and must overcome the strong presumption in favor of its validity. It has been said that the party who wishes to

pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt, and that a party who asserts that the legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position.'

In the case of *State ex rel. Jordan, District Attorney v. Gilmer Grocery Co.*, 156 Miss. 99, 125 So. 710, at p. 714, this Court said: 'Our own Court is committed to the proposition that a statute should be so construed as to render its constitutional, if possible, and a statute will not be declared invalid unless it is clearly apparent that it conflicts with the organic law after resolving all doubts in favor of its validity.'

It was also pointed out in *State ex rel. Knox, Attorney General v. Speakes et al.*, 144 Miss. 125, 109 So. 129, that where the meaning of a provision in a statute is not ascertainable from the act itself, it cannot be enforced by the courts, and certainly courts cannot go outside of the amendment of 1960 in this case, and the record, to find some meaning by which the amendment may be declared unconstitutional.

We are reminded by the language set out in 16 C.J.S. Constitutional Law § 151(1), p. 738, that: 'The power of the judiciary in determining the constitutionality of a statute is limited to deciding whether it is within the scope of the constitutional powers of the legislative department. The judiciary will interfere with acts of the legislative body only where they are beyond the bounds prescribed by the constitution, and a legislative usurpation of power should be clear, palpable, or oppressive, and the claimed infringement of the constitution must be real to justify interposition. Limitations on the power of the legislature which the people have been satisfied to leave to the judgment,

> patriotism, and sense of justice of the legislature are not within the control of the courts. It is for the legislature and not for the courts to determine what means shall be employed to accomplish ends within its constitutional powers, * * *'." 243 Miss. at 812-814, 138 So.2d at 925-926.

Absent the provision referring to Highways 14 and 15 intersecting, the statute, which is a general statute, appears to be constitutional. Even though Louisville Municipal Separate School District encompasses all territory of the county, there are statutory procedures whereby any other county in the state could become similarly situated. Without the offensive part of Section 37-7-203, the statute appears to be rational and germane to the subject matter.

We hold that the part of said statute under consideration here which reads "in which Highways 14 and 15 intersect" is unconstitutional, that such offensive language be stricken from the act and that the remaining portion of the statute is constitutional. We further hold that the chancellor erred in finding the entire portion of the statute to be unconstitutional and the decree is reversed and judgment entered here on said question.

II.

Did the chancellor err in holding that the constitutional rights of appellants were not being violated under the one-man one-vote principle?

III.

Did the chancellor err in amending his decree after an appeal had been perfected to the Mississippi Supreme Court?

Appellants contend that their right to vote for trustees is being unconstitutionally diluted in violation of the Equal

Protection Clause of the Fourteenth Amendment and that the one-man one-vote rule is applicable to the election of trustees for said school district. They cite *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), and *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). In *Hadley*, the Supreme Court stated:

> "Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important govermental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.
>
> * * *
>
> . . . Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor—these officials are elected by popular vote.
>
> * * *
>
> . . . If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he

votes for a school board member as when he votes for a state legislator. While there are differences in the power of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

* * *

It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' *Avery*, supra, 390 U.S. at 482, 88 S.Ct. at 1119, 20 L.Ed.2d at 52, and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." 397 U.S. at 53-56, 90 S.Ct. at 794-795, 25 L.Ed.2d at 49-51.

Appellees argue that the one-man one-vote rule does not apply and, among other decisions, cite *Sailors v. Board*

of Education of the County of Kent, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967), wherein the court said that the rule did not apply since the county school board members were elected by delegates from local school boards and that the function of said school board was administrative rather than legislative or governmental. The Court further stated:

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. Our cases have, in the main, dealt with elections for United States Senator or Congressman . . .
>
> • • •
>
> . . . If we assume arguendo that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray v. Sanders* [372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821] and *Reynolds v. Sims* [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506] must be met, no question of that character is presented. For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy." 387 U.S. at 108, 111, 87 S.Ct. at 1552, 1553, 18 L.Ed.2d at 653, 655.

The selection process here is neither fish nor fowl, three members of the board being appointed in the city and two members being elected outside the city. However,

since the decision on Question I decides this case, we do not reach the problem presented by the one-man one-vote rule, and it is not necessary that we pass on the second and third questions here. Suffice it to say, we call attention of the Bench, Bar and Legislature to the question (which we do not decide) presented by the one-man one-vote rule which may affect fifty-two (52) municipal separate school districts in the State of Mississippi.

After consideration of this case by a conference of justices en banc, and for the reasons stated, the decree of the trial court is reversed, judgment is rendered here for appellants, and the case is remanded to the chancery court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

PATTERSON, C. J., SMITH and ROBERTSON, P. JJ., and SUGG, WALKER, BROOM and COFER, JJ., concur.

BOWLING, J., took no part.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 14, 1979

Laurel G. Weir, Esq.
Box 156
Philadelphia, MS 39350

Re: Ralph Hathorn, Mayor of Louisville, et al.
v. Mrs. Bobby Lovorn, et al.
No. 78-1517

Dear Mr. Weir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/ Michael Rodak, Jr.
Michael Rodak, Jr., Clerk

(Filed May 16, 1980)

IN THE
CHANCERY COURT OF WINSTON COUNTY,
MISSISSIPPI

SAMMY CARTER ET AL
COMPLAINANTS

VS

MRS. CURTIS LUKE ET AL
DEFENDANTS

PETITION TO MODIFY AND CHANGE DECREE AND OTHER RELIEF

TO THE HON. CHANCERY COURT OF WINSTON COUNTY, MISSISSIPPI:

1. The adult Complainants, Mrs. Bobbie Lovern of Dist. 1, Winston County, Miss., Joe Goodin of Dist. 2 said county, J. D. Eaves of Dist. 3 said county, Prentiss Carter of Dist. 4 said County, and Sammy Carter of Dist. 5 said county, all live outside the City Limits of Louisville, Miss., but in the Louisville Municipal Separate School District that embraces the entire County of Winston. The adult respondents are the same parties originally in this cause and the entire court file is made a part of this petition by reference just as if copied fully in words and figures herein.

2. On April 9, 1979, The Supreme Court of The State of Mississippi entered a final judgment in this cause and issued their mandate as shown by a true and correct copy of same that is hereto attached and made a part of this petition just as if copied fully in words and figures herein. The ruling of The Mississippi Supreme Court reversed

the cause and required the holding of an election for the members of the trustees of The Louisville Municipal Separate School District, one from each of the 5 supervisor districts in Winston County, and remanded the matter to the Chancellor for a decree not inconsistent with said opinion. The Miss. Supreme Court did not order the matter submitted to The United States Department of Justice as to approval under the voting rights act of 1965, although appellees and present respondents contended they should. The statute involved requiring the election was enacted by The Legislature of Miss. before the voting rights act came into effect and Section 37-7-203 Miss. Code of 1972 as well as other laws require such election as required by The Miss. Supreme Court and does not State whether the person elected shall be by plurality or for a run-off election in the event no candidate receives a plurality of the votes when the election is first held.

3. After The Miss. Supreme Court decision was entered the respondents filed a petition for writ of Certiorari to The United States Supreme Court alleging among other things that the Miss. Supreme Court had erred in not complying with the voting rights act of 1965 and that no election could be held until Section 5 of the voting rights act was complied with. The Miss. Supreme Court Decision is marked exhibit A and the petition for writ of Certiorari is attached and marked exhibit B and made a part of this petition just as if copied fully herein. A response, although not required by The United States Supreme Court, was made by appellants and petitioners herein and as shown by a copy of same that is hereto attached and marked exhibit C. The United States Supreme Court denied the writ of certiorari and ordered the mandate of The Miss. Supreme Court enforced on May 14, 1979, as shown by a true copy of same attached and marked

exhibit D and thereby rejecting the issue that the matter came under the voting rights act as well as requiring the election.

4. Despite the mandates of The Miss. Supreme Court and the United States Supreme Court it was necessary for Appellants and petitioners herein to file a petition to enforce the mandates and same was filed on June 18, 1979, and the Chancellor entered a Decree July 24, 1979, requiring the election, but ordered it submitted to the United States Attorney General with supporting data by respondents for approval under the voting rights act and also by a Decree dated August 22, 1979, copies of which are attached, and retained jurisdiction so that this cause could be heard by this Court In Vacation or term time as shown by said Decrees attached and made a part hereof just as if copied fully herein. They are marked exhibits E and F respectively. The Decree of August 22, 1979, changed the July decree to state:

> "6. If no candidate receives a majority of the vote cast at any of said elections held on December 1, 1979, a run off election shall be held during the same hours and at the same place two weeks later on December 15, 1979, as provided by statute. The runoff shall be between the two candidates receiving the highest vote on December 1, 1979."

A decree postponing the election was entered October 1, 1979, as shown by a copy of the decree of said court marked Exhibit G and made a part of this petition just as if copied fully herein, because the Attorney General of the United States of America and especially his assistants to whom it was assigned, Hon. Drew S. Days III and Hon. Andrew Karon finally, but not within a time prescribed by law, interposed a single objection, that is that their only

objection was that a runoff election was being required by the Hon. Chancery Court of Winston County instead of the one receiving the highest number of votes would be the trustee at the elections to be held in each supervisor district as is the usual practice in the other 82 counties or majority of the other 82 counties. Petitioners have no objection to this procedure and therefore this would be acceptable and the former decrees should be modified and changed so that an election be immediately held under orders of this Court and the candidate receiving the highest number of votes at the election be declared the trustee for the district in which he or she is elected. As already stated, the particular statute involved does not make provision as to how the election is to be conducted as to whether or not the candidate receiving the highest number of votes is declared elected trustee or if a run off election is necessary. This is immaterial to petitioners, as they are interested in their school and school children and the school district and having an election as required by law and the one-man, one-vote, theory applied.

5. It is also contended that this matter does not come under the voting rights law for reasons already stated and said U. S. Attorney General and/or no one else has any authority to pass on this matter due to the rulings of The United States Supreme Court who has answered this question as well as the other reasons herein stated, but if necessary, the additional parties should be made parties defendants and summoned according to law.

6. An action was first brought in The United States District Court in The Northern District of Miss., Eastern Division, involving the same matter, and by an order entered July 1, 1975, the matter was held in abeyance until the matter could be filed and concluded in the District State Courts as shown by a copy of the order attached and

marked exhibit H and after the Chancellor ordered the election the case was finally dismissed without prejudice because of the circumstances March 22, 1979, as shown by a copy of same attached and marked exhibit I. A motion is being made to reinstate the matter in said U. S. District Court so as to again retain jurisdiction in cause no. EC 74-161-S.

7. Petitioners and those they represent as citizens of Winston County are entitled to an immediate election and demand same. Hon. Benjamin Civiletti is Atty. Genl. of U. S. A. if the Court require he be made a party defendant.

PREMISES CONSIDERED PETITIONERS PRAY that this petition be filed, docketed, and heard as soon as possible and that the former decrees be modified and changed so that this court will order an immediate election for trustees in each of the Supervisor Districts and if necessary to provide that the candidate receiving the highest number of votes at the election be declared elected trustee; and not require the Attorney General of The United States to approve same; or in the alternative that he be made a party defendant and that this Court will require his approval of said Decree and petitioners pray for all other relief as they may be entitled to receive under the law and Equity and as in duty bound they will ever pray.

Sammy Carter et al, petitioners, by their attorney, Laurel G. Weir, Box 156, Philadelphia, Miss. 39350:

/s/ Laurel G. Weir

(Exhibits are omitted in printing)

(Affidavit and Certificate of Service are omitted in printing)

(Filed September 30, 1980)

IN THE CHANCERY COURT OF WINSTON
COUNTY, MISSISSIPPI
VACATION TERM, SEPTEMBER, 1980
NO. 11,222

SAMMY CARTER, ET AL
COMPLAINANTS

VS.

MRS. CURTIS LUKE, ET AL
DEFENDANTS

FINAL DECREE

On this day this cause came on to be heard on an affirmative defense raised by the Defendants, MRS. CURTIS LUKE, ET AL, being the first defense contained in their Answer filed by said Defendants and each party being present in their proper person and represented by counsel and the Court having heard argument in support of this defense and having jurisdiction of the parties and subject matter, doth find that the Complainants are not entitled to the relief prayed for in their Petition to Modify and the Court doth further find that Section 37-7-217 requires a runoff election and, therefore, Complainants' Petition to Modify is not well taken and should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That, the first defense raised by the Defendants, MRS. CURTIS LUKE, ET AL, is hereby sustained.

2. That, the Complainants are not entitled to have the former Order of this Court modified or changed to provide

for a plurality election rather than a runoff election since the Statute provides for a runoff.

3. That, the Court has heretofore ruled that the Attorney General of the United States would not be made a party Defendant, and the Court has no authority to order the Attorney General to approve the election.

4. That, the Petition filed by the Complainants May 15, 1980, be and it is hereby dismissed with the prior Order of this Court calling the election to remain in force subject to compliance with the Federal Voters Rights Act as previously ordered by this Court.

SO ORDERED, ADJUDGED AND DECREED in Vacation in the offices of the Chancellor in Louisville, Mississippi, on this the 30th day of September, 1980.

/s/ John C. Love Jr.

Opposition

Office - Supreme Court, U
FILED
NOV
ALEXANDER L.
CLERK

No. 81-451

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

RALPH HATHORN, et al.,
Petitioners,

vs.

MRS. BOBBY LOVORN, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the
Supreme Court of Mississippi

BRIEF OF RESPONDENTS IN OPPOSITION

Laurel G. Weir
Post Office Box 156
Philadelphia, Mississippi 39350
(601) 656-1931
Attorney for Respondents

QUESTION PRESENTED FOR REVIEW

May a state supreme court order compliance with its prior directive which requires a lower court to hold elections pursuant to state statutes, when the prior directive does not determine the applicability of § 5 of the Federal Voting Rights Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.	i
TABLE OF CONTENTS.	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW.	1
JURISDICTION	1
STATUTES INVOLVED.	2
STATEMENT OF THE CASE.	2
REASONS FOR DENYING THE WRIT	4
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Page

Allen v. State Board of Elections, 393 U.S. 544 (1969) 6

Carter v. Luke, 399 So. 2d 1356 (Miss. 1981) . . . 4

City of Rome v. United States, 446 U.S. 156 (1980) 8

Dougherty County Board of Education v. White, 439 U.S. 32 (1978) 8

Lovorn v. Hathorn, 365 So. 2d 947 (Miss.), cert. denied, 441 U.S. 946 (1979) . . . 3

McDaniel v. Sanchez, ___ U.S. ___, 101 S. Ct. 2224 (1981) 7

Perkins v. Matthews, 400 U.S. 379 (1971) 6

United States v. Board of Commissioners of Sheffield, Alabama v. White, 435 U.S. 110 (1978) 8

United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 642 (1977) 5

Statutes

Federal Voting Rights Act, 42 U.S.C. § 1973c. 3, 6

Miss. Code Ann. § 37-7-203 (Supp. 1979) 2

No. 81-451

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

RALPH HATHORN, et al.,
Petitioners,

vs.

MRS. BOBBY LOVORN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

Respondents concur with petitioners' references to the opinion below.

JURISDICTION

Respondents concur with petitioners' statement as to the jurisdiction of this Court, except as to the presence of a substantial federal question, as discussed infra.

STATUTES INVOLVED

Respondents concur with petitioners' statement as to the statutory provision involved.

STATEMENT OF THE CASE

Since the enactment of Miss. Code Ann. § 37-7-203 (Supp. 1979) in 1964, the board of trustees of local school districts must be elected from supervisors' districts in Mississippi. After the passage of seventeen years, however, the Board of Trustees of the Louisville Municipal Separate School District is still not an elected body. Since 1960 the Board has been composed of five members, three appointed by the governing authorities of the City of Louisville and two elected by the qualified electors outside the City in the County of Winston.

In 1978 Respondents sued Petitioners in the Chancery Court of Winston, seeking a mandatory injunction to enforce the election of a five-member school board. The Chancery

Court denied relief, but on appeal the Supreme Court of Mississippi reversed, and remanded the case for election of one trustee from each supervisor's district. Lovorn v. Hathorn, 365 So. 2d 947 (Miss. 1979). Petitioners sought a Writ of Certiorari from this Court, arguing that the changes in election procedure and a state court decree were covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The Petition was denied. Lovorn v. Hathorn, supra, cert. denied, 441 U.S. 946 (1979).

The Chancery Court outlined the election procedure in a very detailed decree on July 24, 1979, and ordered that it be submitted for preclearance or approval under the Voting Rights Act. The only objection to the procedure made by the United States Department of Justice was that Mississippi law required a run-off if no candidate received a majority of votes cast.

On September 30, 1980, the Chancery Court ordered that the election remain in force subject to compliance with the Voting Rights Act.

The Supreme Court of Mississippi again reversed, and ordered that the election be held in accordance with its original mandate. Carter v. Luke, 399 So. 2d 1356 (Miss. 1981). The Supreme Court of Mississippi refused to enforce the Chancery Court's requirement that compliance be had with the Voting Rights Act.

REASON FOR DENYING THE WRIT

The Petition for a Writ of Certiorari does not present a substantial or important federal question worthy of review. In 1978 the Supreme Court of Mississippi ordered an election to be held in accordance with state law. The decision here under challenge merely ordered compliance with that original mandate. Review by this Court would not entail the merits of a federal question, but

rather the relationship between two state courts and the lower court's responsibility to follow the dictates of a superior court.

The role of a state court in applying and enforcing the Voting Rights Act would present important and intellectually stimulating questions. Such questions are not raised by the circumstances of this case. Petitioners maintain that the election changes are within the meaning of § 5 of the Act, and that the state supreme court should have upheld the Chancellor's determination that the Act applies to the changes. No other court addressed the applicability of the Act. Under well-established principles, it is for a local federal district court to determine whether the change is covered by § 5, and the District Court for the District of Columbia has jurisdiction to determine whether the change is discriminatory. United States v. Board of Supervisors of Warren County, Mississippi, 429

U.S. 642 (1977); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Board of Elections, 393 U.S. 544 (1969). If the Mississippi Supreme Court had made either determination the question might arguably be worthy of review. The court, however, merely refused to enforce the Chancellor's determination.

The Voting Rights Act also provides for advance approval of the change by the Attorney General upon submission by "the chief legal officer or other appropriate official" of the state or subdivision. 42 U.S.C. § 1973c. While a letter with one objection was issued by the Department of Justice, it was addressed to Petitioner's Counsel of Record. Petition for Writ of Certiorari, Appendix C at A7. Unlike other preclearance cases reaching this Court, none of the normal processes conducive to the development of a complete record have occurred in this case.

In McDaniel v. Sanchez, ___ U.S. ___, 101 S. Ct. 2224 (1981), relied on by Petitioners, the Court affirmed a determination by the Court of Appeals for the Fifth Circuit that a reapportionment plan was within § 5 of the Act. The present situation is clearly quite different, and so unique that its recurrence is highly unlikely. Not only is there an absence of either federal judiciary involvement or a ruling on the merits of preclearance except by the Chancery Court, in addition, the local officials here favor preclearance. Unlike the normal situation in which local officials oppose application of § 5, the Respondents have fought the changes throughout the state court system and now seek to delay their implementation.

The decision below was not only legally correct, it was also the fairest and most just under the circumstances. If the objection to the majority run-off had

prevented the election, the right to elect local officials and one-man-one-vote principles would have been compromised. The change to elected rather than appointed officials does not have the potential to deny rights conferred by the Act or to discriminate. Dougherty County Board of Education v. White, 439 U.S. 32 (1978); United States v. Board of Commissioners of Sheffield, Alabama v. White, 435 U.S. 110 (1978). If the election had been stayed pending preclearance, the election would be under the scheme in effect in 1964. City of Rome v. United States, 446 U.S. 156 (1980). Confusion would clearly result since it is unclear whether the statutory elective or the appointive scheme would apply.

The Supreme Court of Mississippi did not adopt an election plan, but merely ordered compliance with the appropriate Mississippi statutes. Review now would necessarily entail a determination of

whether the Attorney General could "overrule" a state supreme court order.

CONCLUSION

Respondents maintain that the Writ should not be issued, as no substantial federal question is presented. The decision of the court below was correct, and the same circumstances are unlikely to be repeated. This case is not an appropriate vehicle for determining the role of a state court under the Federal Voting Rights Act.

Respectfully submitted,

Laurel G. Weir
Post Office Box 156
Philadelphia, Mississippi 39350
(601) 656-1931
Attorney for Respondents.

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS
CLERK

No. 81-451

In the Supreme Court of the United States

October Term, 1981

RALPH HATHORN, ET AL.,
Petitioners,

VS.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE PETITIONERS

FAIR & MAYO
JAMES C. MAYO
(Counsel of Record)
P. O. Box 509
Louisville, Mississippi 39339
DERAMUS, LEWIS & TUCKER
FRANK M. DERAMUS
P. O. Box 532
Louisville, Mississippi 39339
Attorneys for Petitioners

R. L. MERCHANT, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

1. Whether a State Supreme Court can order non-compliance with the Federal Voters Rights Act of 1965 as Amended, Sec. 5, 42 U.S.C.A. Sec. 1973 c.

PARTIES TO THE PROCEEDING

Petitioners:

Ralph Hathorn, Mayor, City of Louisville
Charles Lawrence, City Clerk
Robert E. Clark, Jr., Alderman
Mike Cournoyer, Alderman
Andy Woods, Alderman
Bobby McWhirter, Alderman
Giles Ward, Alderman
City of Louisville, MS, a Municipal Corporation
Thomas W. Saterfiel, Superintendent, Louisville Municipal Separate School District
Paul Younger, Trustee
Kenny Morris, Trustee
Jerry Kemp, Trustee
Veterine Williams, Trustee
Mike Frazier, Trustee

Respondents:

Sammy Carter
Joe Goodin
Mrs. Bobby Lovorn
J. D. Eaves
Prentiss Carter

TABLE OF CONTENTS

Question Presented I
Parties to the Proceeding II
Opinion Below 1
Jurisdiction 1
Statute Involved 2
Statement of the Case 2
Summary of Argument 4
Argument—
I. The Decision of the Mississippi Supreme Court ordering non-compliance with the Voting Rights Act when the Justice Department had previously disapproved the submission was error because Congress did not vest this authority in the covered States 4
Conclusion 8
Certificate of Service 9

Table of Authorities

CASES

Allen v. State Board of Elections, 89 S.Ct. 817 (1969) 6
Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401, 51 S.Ct. 498 5
Lovorn v. Hathorn, 365 So.2d 947 (Miss. 1979), Cert. denied 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979) 2, 6
McDaniel, et al. v. Sanchez, et al., 101 S.Ct. 2224 (1981) 7, 8
Perkins v. Matthews, 91 S.Ct. 431 (1971) 5, 6

STATUTE

Voting Rights Act of 1965, as Amended, Sec. 5, 42 U.S.C.A. Sec. 1973 c 2, 3, 4, 5, 6, 7, 8

CODE

Mississippi Code of 1972, Section 37-7-203 2

No. 81-451

In the Supreme Court of the United States

October Term, 1981

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE PETITIONERS

OPINION BELOW

The decision of the Supreme Court of Mississippi is reported at 399 So.2d 1356 and is appended to the Petition for Cert. as Appendix "A".

JURISDICTION

The decision of the Supreme Court of Mississippi was entered on June 3, 1981, and Rehearing denied on July 8, 1981. The Petition for a Writ of Certiorari was filed August 28, 1981, and was granted on December 14, 1981.

STATUTE INVOLVED

Voting Rights Act of 1965, as Amended, Sec. 5, 42 U.S.C.A. Sec. 1973 c and is appended to the Petition for Cert. as Appendix "B".

STATEMENT OF THE CASE

Since 1960, the Board of Trustees of the Louisville Municipal Separate School District has embraced the entire County of Winston and is composed of five (5) members: Three (3) appointed by the governing authorities of the City of Louisville and two (2) elected by the qualified electors outside the City.

Respondents sued the Petitioners in the Chancery Court of Winston County, Mississippi, seeking to change the method and manner of the selection of Trustees for the school district and after the Chancellor dismissed Respondents' complaint, the cause was appealed to the Mississippi Supreme Court which reversed on January 10, 1979 in the case of *Lovorn v. Hathorn*, 365 So.2d 947 (Miss. 1979), Cert. denied 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979) requiring the election of one trustee from each supervisor's district pursuant to Section 37-7-203 Mississippi Code of 1972 (Amended in 1964).

On July 24, 1979, the Chancery Court of Winston County, pursuant to the mandate of the Mississippi Supreme Court, outlined the election procedure. However, the Chancellor ordered that the election procedures as decreed be submitted either to the United States Attorney General or the United States District Court for the District of Columbia in accordance with 42 U.S.C. Sec. 1973 c. After additional data was forwarded to the United States

Department of Justice, the Civil Rights Division of the United States Attorney General's office advised the Appellees in a letter, dated March 28, 1980, that it objected to the change in the election procedure and advised the Petitioners that the changes in the election procedure were legally unenforceable, a copy of said letter from the United States Attorney General is appended to the Petition for Cert. as Appendix "C".

After additional hearings, the Chancery Court of Winston County, Mississippi, on September 30, 1980, decreed that the election would remain in force subject to compliance with the 1965 Voting Rights Act and postponed the election.

Respondents appealed to the Mississippi Supreme Court and the Court on June 3, 1981 reversed the Chancery Court Decree which made the election subject to compliance with the Federal Voters' Rights Act. On July 8, 1981, the Supreme Court of Mississippi denied the Petition for Rehearing.

The Supreme Court remanded the case to the Chancellor directing him to conduct the election without regard to the Voting Rights Act of 1965. On August 4, 1981, the Chancery Court of Winston County, Mississippi, decreed that the election must be held and ordered Respondents to disregard the legally unenforceable letter of the Attorney General of the United States dated March 28, 1980, and to otherwise ignore Section 5 of the Voting Rights Act. The elections were held on December 5 and 19, 1981, and new trustees were adjudicated into office December 24, 1981.

SUMMARY OF ARGUMENT

It is the position of the Petitioners that the Supreme Court of Mississippi does not have authority to order non-compliance with the Voting Rights Act especially since the Civil Rights Division of the United States Department of Justice had accepted the submission as being completed on January 28, 1980, and issued its legally unenforceable letter to Petitioners on March 28, 1980.

ARGUMENT

I

The Decision of the Mississippi Supreme Court Ordering Non-Compliance With the Voting Rights Act When the Justice Department Had Previously Disapproved the Submission Was Error Because Congress Did Not Vest This Authority in the Covered States.

The Mississippi Supreme Court in its decision overruling the Chancery Court as (4) "the Decree calling the election would remain in force subject to compliance with the 1965 Voting Rights Act" does not recite any statutory or case law authority to support the reversal so Petitioners submit a reversal on a federal question without authority is unprecedented.

An inference is made from the decision of the Supreme Court of Mississippi that since the United States Supreme Court denied Certiorari of No. 49,446, the Mississippi Supreme Court can consider the denial an adjudication on the merits that there are no requirements for preclearance under the Voting Rights Act. We respectfully submit that a denial of Certiorari is not an adjudication on the merits and the mere fact that the United States Supreme

Court declined to reverse or alter in any respect the prior decision of the Mississippi Supreme Court is not controlling on the merits of the Section 5 preclearance. Denial of Writ of Certiorari imports no expression of opinion upon the merits of the case. *Atlantic Coast Line R. Co. v. Powe,* 283 U.S. 401, 51 S.Ct. 498.

The pertinent part of the Voting Rights Act enacted in 1965, and Amended in 1975 in Section 5 is attached as Appendix "B" to Petition for Cert. and we respectfully submit where reference is made to a "state or political subdivision", it is applicable to all branches of the state government and its political subdivisions and would include State Supreme Court ordered changes or efforts to administer changes by the legislative, executive and judicial branches of state government; therefore, the Supreme Court of Mississippi and the Chancery Court of Winston County are subject to the Federal Law and the Mississippi Supreme Court is without legal authority to mandate Petitioners to disobey the Voting Rights Act and the Attorney General of the United States.

Even though the legislature of the State of Mississippi enacted the amendment prior to 1965, the Respondents acting through the State Courts seek to administer a change in the method and manner of the election procedures of the Louisville Municipal Separate School District different from that in force on November 1, 1964. See *Perkins v. Matthews,* 91 S.Ct. 431 (1971). This case holds that any change in voting procedures for the City of Canton was within the meaning of Section 5, Voting Rights Act and required compliance before implementing the change in the election procedures. In *Perkins v. Matthews,* supra, the legislature had changed the law for the election of Aldermen prior to the enactment of Section 5, but Canton did not attempt to change its voting procedures and comply

with the new state law until after the enactment of Section 5. The Supreme Court of the United States in *Perkins* made Section 5 applicable when any covered jurisdiction seeks to administer voting changes.

The changes sought in the election of the Trustees of the Louisville Municipal Separate School District are squarely covered by *Perkins* and Section 5 in that the legislature changed the law as to county-wide municipal separate school district in 1964 and after the enactment of the Act within a covered jurisdiction a state court and the Respondents are seeking to administer legislative change. The legislature enacted a change in Trustees from 3 appointed and 2 elected to one trustee elected in each supervisor's district in a county-wide municipal separate school district where highways 14 and 15 intersect (Winston County only). The Mississippi Supreme Court in 49,446 *Lovorn v. Hathorn*, supra, ordered the foregoing change.

The submission was made by Petitioners to the Attorney General of the United States in compliance with the Voting Rights Act as ordered by the Chancery Court which submission was completed on January 28, 1980. The Attorney General stated his objection on March 28, 1980.

The decision of the Supreme Court of Mississippi requiring the Chancery Court to implement the legally unenforceable procedures and voting changes and to install into office elected trustees from each supervisor's district when preclearance has been denied violates Section 5 of the Voting Rights Act of 1965. The Attorney General of the United States has previously advised Petitioners that the change in the election procedures were legally unenforceable (See Appendix "C" to the Petition for Cert.).

In the case of *Allen v. State Board of Elections*, 89 S.Ct. 817 (1969) an argument was made that Section 5

was not intended to apply for a change from district to at large voting. The Supreme Court of the United States held

> "We must reject the narrow construction that Appellees would give to Section 5. The Voting Rights Act was aimed at the subtle as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decision of this Court, the Act give a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. Section 1973 1(c) (1) (1964 ed., Supp. I). See Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964). We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the Section 5 approval requirements.
>
> The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."

On June 1, 1981, the Supreme Court of the United States in Number 80-180 *McDaniel, et al. v. Sanchez, et al.*, 101 S.Ct. 2224 (1981), in construing a Commissioner's Reapportionment Plan from Kleberg County, Texas, and affirming the Fifth Circuit Court of Appeals, 615 F.2d 1023, held that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited choices available to them—the preclearance requirement of the Voting Rights Act is applicable even though the Federal District Court had acted upon the

proposed plan before it had been submitted to the Attorney General or the United States District Court for the District of Columbia for preclearance. Even though the Federal District Court had approved and ordered the redistricting, the Supreme Court of the United States in *McDaniel, et al.*, says that preclearance is required in Court ordered reapportionment even in the face of other constitutional questions.

CONCLUSION

The Mississippi Supreme Court erred in reversing the Chancery Court of Winston County as to (4) supra and ordering non-compliance with the Voting Rights Act. The decision of the Lower Court should be reversed and the trustees elected pursuant to said decision should be removed from office.

Respectfully submitted,

FAIR & MAYO
JAMES C. MAYO
(Counsel of Record)
P. O. Box 509
Louisville, Mississippi 39339
DERAMUS, LEWIS & TUCKER
FRANK M. DERAMUS
P. O. Box 532
Louisville, Mississippi 39339
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, James C. Mayo, one of the attorneys for the Petitioners, do hereby certify that I have this day, served three (3) true and correct copies of the foregoing Brief for the Petitioners, to the following:

Laurel G. Weir
Attorney at Law
P. O. Box 156
Philadelphia, Mississippi 39350

This, the 15th day of January, 1982.

JAMES C. MAYO

Respondent's Brief

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-451

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RALPH HATHORN, et al.,

Petitioners,

v.

MRS. BOBBY LOVORN, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Mississippi

BRIEF FOR THE RESPONDENTS

Laurel G. Weir
(Counsel of Record)
Post Office Box 156
Philadelphia, MS 39350
(601) 656-1931
Attorney for Respondents

QUESTION PRESENTED

Whether a state supreme court can decline to decide the applicability of the Voting Rights Act of 1965 to a state election, when in a prior final judgment, wherein the question was not timely presented, the court has ordered the election and established the law of the case?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE. 2

SUMMARY OF ARGUMENT. 6

ARGUMENT

I. THE DECISION OF THE MISSISSIPPI SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS, PRECLUDING PETITIONERS FROM INVOKING THE JURISDICTION OF THIS COURT 7

II. THE DECISION OF THE MISSISSIPPI SUPREME COURT ADHERING TO ITS FORMER FINAL ORDER WAS PROPER, WHERE THE LOWER COURT HAD NO AUTHORITY TO DETERMINE WHETHER COMPLIANCE WITH THE VOTING RIGHTS ACT WAS REQUIRED, AND THE ATTORNEY GENERAL HAD NO AUTHORITY TO OVERRULE THE PRIOR MISSISSIPPI SUPREME COURT DECISION. 22

CONCLUSION 31

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

CASES: PAGE

Allen v. State Board of Elections, 393 U.S. 544 (1969) 25

Bloeth v. State of New York, 82 S. Ct. 661 (1962) (Harlan, J., in chambers) 20

Cardinale v. Louisiana, 394 U.S. 437 (1969) 9

Carter v. Luke, 399 So. 2d 1356 (Miss. 1981) 4, 15

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) 14

Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co., 244 Miss. 465, 142 So. 2d 200 (1962) 8

Henry v. State of Mississippi, 379 U.S. 443 (1965) 9, 10

Herndon v. State of Georgia, 295 U.S. 441 (1935) 20

Lovorn v. Hathorn, 365 So. 2d 947 (Miss.), cert. denied, 441 U.S. 946 (1979) 3, 4

McDaniel v. Sanchez, ___ U.S. ___, 101 S. Ct. 2224 (1981) 28, 29, 30

Michigan v. Tyler, 436 U.S. 499 (1978) 10

Mississippi College v. May, 241 Miss. 359, 128 So. 2d 557 (1961) 8

TABLE OF AUTHORITIES, Continued

CASES, Continued: PAGE

New and Hughes Drilling Co. v. Smith, 219 So. 2d 657 (Miss. 1969) 19

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 20

Raley v. State of Ohio, 360 U.S. 423 (1959) 19

Reece v. State of Georgia, 350 U.S. 85 (1955) 11, 12, 15

Rigdon v. General Box Co., 249 Miss. 239, 162 So. 2d 863 (1964) 20

Rio Grande Western Railway v. Stringham, 239 U.S. 44 (1915) 16

Street v. New York, 394 U.S. 576 (1969) 19

United States v. Denver & Rio Grande Railroad, 191 U.S. 84 (1903) 13

United States v. Warren County Board of Supervisors, 429 U.S. 642 (1977) 25

Urie v. Thompson, 337 U.S. 163 (1949) 14

Webb v. Webb, ___ U.S. ___, 101 S. Ct. 1889 (1981) 18, 19

TABLE OF AUTHORITIES, Continued

CASES, Continued: PAGE

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 10

STATUTES:

Miss. Code Ann. § 11-3-31 (1972) 9

M.C.A. § 37-7-203 (Supp. 1979) 2, 3

M.C.A. § 37-7-217 (Supp. 1979) 4

Voting Rights Act of 1965, 42 U.S.C. § 1973c 3, 23

42 U.S.C. § 1973j(d) 29

No. 81-451

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RALPH HATHORN, et al.,

Petitioners,

v.

MRS. BOBBY LOVORN, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Mississippi

BRIEF FOR THE RESPONDENTS

JURISDICTION

Petitioners have not cited the statutory provision upon which jurisdiction rests. As discussed herein, Respondents maintain that this case is not within the jurisdiction of this Court.

STATEMENT OF THE CASE

This action, instituted to compel an election of the Board of Trustees of the Louisville, Mississippi Municipal Separate School District pursuant to Miss. Code Ann. § 37-7-203 (Supp. 1979), was initially filed by Respondents in the United States District Court for the Northern District of Mississippi. Since 1960, three of the trustee positions had been filled through appointment by the governing authorities of the City of Louisville, and the remaining two positions were elective. No black had ever been appointed or elected to the Board of Trustees.[1] After the federal district court abstained (49,446 R. 10-11),[2]

[1] As so found by the United States Department of Justice. See Pet. for Cert. at A8.

[2] "49,446 R." refers to the record of this case from the filing of the complaint to the Supreme Court of Mississippi's first decision. "52,758 R." refers to the record following the Supreme Court of Mississippi's first remand of the case to the chancery court.

the case proceeded through the Mississippi state courts, wherein Petitioners maintained that the state election statute was unconstitutional under state law. Final judgment was rendered by the Supreme Court of Mississippi, Lovorn v. Hathorn, 365 So. 2d 947 (Miss. 1979), wherein the court ordered the chancellor to hold an election in accordance with state law. At no time had the Petitioners raised the contention that the election could not be held because M.C.A. § 37-7-203 required preclearance under section five of the Voting Rights Act, 42 U.S.C. § 1973c.

In a petition for rehearing filed after rendition of the initial Mississippi Supreme Court decision, Petitioners raised for the first time the contention that the election pursuant to state law would violate a federal statute. The state supreme court denied the petition for rehearing without issuing a written opinion.

Petitioners again raised the question of compliance with the Voting Rights Act in a petition for a writ of certiorari, which was denied by this Court, Lovorn v. Hathorn, supra, cert. denied, 441 U.S. 946 (1979). On remand, the Chancery Court of Winston County issued a decree outlining the election procedure, as ordered by the Mississippi Supreme Court, but also deciding that the election was subject to the Voting Rights Act, and that approval of the United States Attorney General was necessary. (52,758 R. 139, 146.) The Attorney General disapproved of the ordered election, objecting to the requirement that a candidate obtain a majority, rather than a plurality, of votes cast to be elected, as provided in M.C.A. § 37-7-217.

The Supreme Court of Mississippi reversed, Carter v. Luke, 399 So. 2d 1356 (Miss. 1981), holding that the chancery

court had disobeyed its prior mandate by not calling the election in accordance with state law. The court held that the law of the case had been established in its prior decision, and did not decide whether, as a matter of federal law, the election of the Board of Trustees had to be approved under the Voting Rights Act. For the second time the Supreme Court of Mississippi ordered an election to be held.

The chancery court, the Mississippi Supreme Court, and this Court denied Petitioners' motions for a stay of the election. The election was conducted on December 5, 1981, with a run-off occurring on December 19. Petitioners' second petition for a writ of certiorari was granted on December 14, 1981.

SUMMARY OF ARGUMENT

The decision below rested on an adequate state ground, as the state supreme court refused to rule on the Voting Rights Act issue because the law of the case had been established in a prior decision. Questions arising during an initial appeal in state court can be reviewed by the Supreme Court even after a remand and second appeal, if the first decision on appeal was not subject to review at that time and if the issue was timely presented. Here, the prior Mississippi Supreme Court decision was final, and thus was subject to review when it was rendered. Moreover, Petitioners did not timely raise their federal claim when it was presented for the first time in a petition for rehearing.

Questions involving application of the Voting Rights Act must be resolved in federal court. The chancery court was not authorized to determine that the

election was covered by the Act, and the supreme court correctly refused to affirm that determination. Since the state supreme court had ordered the election to be held, the Attorney General had no authority to "overrule" that decision without following recognized remedies available in federal court.

ARGUMENT

POINT I

THE DECISION OF THE MISSISSIPPI SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS, PRECLUDING PETITIONERS FROM INVOKING THE JURISDICTION OF THIS COURT.

The Supreme Court of Mississippi, in the decision appealed from, did not rule on whether the election of the local Board of Trustees, as a matter of substantive law, was subject to compliance with the Voting Rights Act. Instead, the court held that the chancery court had disobeyed

the established law of the case as expressed in the prior supreme court mandate. The decision clearly rests on an adequate state procedural ground which serves a legitimate state interest, thereby precluding Petitioners from invoking the jurisdiction of this Court.

As stated by the court in Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co., 244 Miss. 465, 142 So. 2d 200, 206-07 (1962): "The doctrine of 'law of the case' is a rule of practice adopted by the courts and rests upon principles of res judicata. The rule is distinct from the rule of stare decisis and it is not a limitation upon the power of the court." See also Mississippi College v. May, 241 Miss. 359, 128 So. 2d 557, 558 (1961) (the doctrine of the law of the case is founded on public policy and the interests of orderly and consistent judicial procedure). The court below

therefore relied on an established and legitimate state rule of practice to dispose of the case. Pursuant to M.C.A. § 11-3-31 (1972), after judgment by the supreme court, the clerk of the court below must "issue process to enforce the judgment according to its terms." After the supreme court ordered the lower court to hold an election, the lower court refused to call the election until there was compliance with the Voting Rights Act. The chancery court failed to abide by the mandate of the Supreme Court of Mississippi.

It is well settled that a state court judgment will not be reviewed by the Supreme Court when the decision rests on independent and adequate state grounds. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969); Henry v. State of Mississippi, 379 U.S. 443, 446 (1965). "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should

be dismissed as improvidently granted . . . ." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977) (citation omitted). When the state ground is a procedural rule which precludes the assertion of a federal claim, the state must have a legitimate interest in enforcing its procedural rule. Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978); Henry, supra, 379 U.S. at 447.

The rule that a litigant cannot raise new legal issues once an appellate court has determined the issues of the case does serve such legitimate state interests. Without the doctrine of the "law of the case," the termination of any litigation would have to await the exhaustion either of the resources of the unsuccessful party or the resourcefulness of his counsel. When the law is established on the first appeal, the parties and the lower courts are afforded guidance in any further

proceedings. If an unsuccessful party was free to continually raise new issues throughout the proceedings, or to relitigate issues already decided, any semblance of order in state judicial proceedings would be destroyed. The Supreme Court of Mississippi resolved all issues timely raised regarding the election during the first appeal, and was justified in relying on the law of the case when Petitioners attempted to raise a new issue thereafter.

Respondents recognize that a court's reliance on the state ground of the established "law of the case" does not necessarily preclude Supreme Court review. As stated by the Court in Reece v. State of Georgia, 350 U.S. 85, 87 (1955):

> We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, Urie v. Thompson, 337 U.S. 163, 172-173, 69 S. Ct. 1018,

> 1025-1026, 93 L.Ed. 1282, and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case, Davis v. O'Hara, 266 U.S. 314, 45 S.Ct. 104, 105, 69 L.Ed. 303.

The factual situation in Reece demonstrates the circumstances which necessitate the above-stated rule. After being convicted at trial, the defendant in Reece appealed to the Georgia Supreme Court, alleging numerous errors, including the systematic exclusion of blacks from the grand jury which returned the indictment. The state supreme court held that the objection to the composition of the grand jury was not timely, but reversed and remanded for a new trial on another ground. The defendant was again convicted, and appealed to the Supreme Court.

Since the defendant in Reece won

a new trial on his first appeal, the first opportunity for the United States Supreme Court to review the case came after the second conviction. While the initial state supreme court decision became the "law of the case," review of any issues decided therein would of necessity have to be postponed until after remand and a new trial. When a decision not subject to review establishes the law of the case, the issues raised must remain open for review by the Supreme Court even after the case proceeds through the state system a second time. A contrary rule would in effect immunize any issues resolved on the first appeal from federal review.

This rationale was recognized by the Court in United States v. Denver & Rio Grande Railroad, 191 U.S. 84, 93 (1903), wherein the Court stated:

> While the supreme court of New Mexico upon this second writ of error may have considered

> itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below, and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances.

See also Urie v. Thompson, 337 U.S. 163, 171 (1949) (respondont's contention that an issue, raised on the first but not second appeal in state court, was not properly before the Court was meritless, as "petitioner has brought the claim to this Court at his first opportunity"); and Coe v. Armour Fertilizer Works, 237 U.S. 413, 418-19 (1915) (petitioner was not precluded

by the law of the case established on the first appeal, when it was not until the second appeal that a final judgment subject to review was issued).

In the instant case, in contrast to Reece and the cases discussed supra, the initial decision by the Supreme Court of Mississippi was a final judgment subject to review. While the opinion certainly contemplated further proceedings in the court below, all legal issues had been resolved. All that was left for the chancery court to perform was the ministerial duty of ordering the election in accordance with state law as interpreted by the Mississippi Supreme Court. As pointed out by the court below, review was sought by Petitioners at this stage, and was denied. Carter v. Luke, supra, 399 So. 2d at 1358. The court's opinion does not, as suggested by Petitioners, raise the inference that the prior denial of certiorari was an

affirmance on the merits. The decision below merely points out that the final judgment which had established the law of the case had not been modified by this Court, and was therefore still binding. As noted above, it is essential that the Supreme Court be able to review issues not decided in the decision appealed from, but raised in an earlier interlocutory proceeding between the parties. The rule loses its rationale here, however, where the earlier decision was final and subject to review by this Court.

In Rio Grande Western Railway v. Stringham, 239 U.S. 44 (1915), the plaintiff brought suit to quiet title to land. The defendant won at trial but the state supreme court reversed, finding that the plaintiff had a right-of-way to the land in question. On remand, the plaintiff asserted title in fee simple, rather than a mere right-of-way. Judgment was entered according

to the first appellate decision, and the plaintiff again appealed. The state supreme court affirmed, relying on the established law of the case. Ruling that no appeal would lie from the second state supreme court opinion, the Court stated significantly as follows:

> Manifestly the first judgment was final within the meaning of Jud. Code, § 237. It disposed of the whole case on the merits, directed what judgment should be entered and left nothing to the judicial discretion of the trial court. Board of Commissioners v. Lucas, 93 U.S. 108; Bostwick v. Brinkerhoff, 106 U. S. 3; Mower v. Fletcher, 114 U. S. 127; Chesapeake & Pot. Tel. Co. v. Manning, 186 U.S. 238. And as the question sought to be presented arises upon the first judgment—it being final in the sense of § 237—it is apparent that the writ of error addressed to the second judgment presents

> nothing reviewable here. See Northern Pacific R. R. v. Ellis, 144 U. S. 458; Great West. Tel. Co. v. Burnham, 162 U.S. 339; Chesapeake & Ohio Ry. v. McCabe, 213 U.S. 207, 214.

239 U.S. at 47. Similarly, the writ of certiorari addressed to the second Supreme Court of Mississippi decision presents nothing reviewable here.

A second reason exists which precludes Petitioners from invoking the jurisdiction of this Court. Even if review of questions from the first appeal is available, it is axiomatic that any federal question made the subject of a writ of certiorari must have been timely raised and presented. The final judgment of a state court can be reviewed only if the record shows expressly or by clear implication that the federal claim was adequately presented in the state system. Webb v. Webb,

___ U.S. ___, 101 S. Ct. 1889, 1892 (1981); Raley v. State of Ohio, 360 U.S. 423, 435 (1959). The Supreme Court of Mississippi did not rule on the question of the Voting Rights Act, raising a presumption that the omission was due to the want of a proper presentation in the state court. Webb, supra, 101 S. Ct. at 1891; Street v. New York, 394 U.S. 576, 582 (1969).

The question of the Voting Rights Act was initially raised in a petition for rehearing after the first supreme court opinion. In Mississippi, only in exceptional cases will the court examine a point raised for the first time in a petition for rehearing. New and Hughes Drilling Co. v. Smith, 219 So. 2d 657, 661 (Miss. 1969). On appeal to the state's highest court, "an appellee should anticipate that the case may be reversed on the issues raised by appellant, and if he wishes to raise a point in event of

reversal he must do so in his brief, otherwise he waives it." Rigdon v. General Box Co., 249 Miss. 239, 162 So. 2d 863, 864 (1964). Moreover, this Court has held that an attempt to raise a federal question for the first time in a petition for rehearing after judgment of a state supreme court comes too late to be the basis for Supreme Court review. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945); Herndon v. State of Georgia, 295 U.S. 441, 443 (1935); see also Bloeth v. State of New York, 82 S. Ct. 661, 662 (1962) (Harlan, J., in chambers) (Court is without jurisdiction to hear case where the federal questions were not raised in the state court until the second motion for reargument).

The federal question regarding the Voting Rights Act was not adequately presented during the first appeal so as to permit the invoking of Supreme Court review.

Petitioners cannot now revive the issue merely because the chancery court erroneously considered the issue, an action which was contrary to the supreme court's mandate.

Respondents are not suggesting that potential coverage under the Voting Rights Act can be waived. In an action between private litigants, however, the Act can be used as a defense only if it is timely raised. Respondents sued the Petitioners to compel an election under state law. If the Voting Rights Act was to be used to defend against the requested election, it would have to be adequately presented in the state court. The Petitioners, as private litigants, could at any time have invoked the jurisdiction of the local federal district court for a declaratory judgment that the election was subject to the federal statute. The United States Justice Department has also filed suit, alleging that the election was held without

the necessary federal approval. There is, therefore, no chance that the important policies underlying the Voting Rights Act will be subverted by allowing the lower court's decision in this case to stand.

The decision of the Supreme Court of Mississippi rests on an adequate state ground, and the Petitioners have failed to assert their federal claim in a timely manner.

POINT II

THE DECISION OF THE MISSISSIPPI SUPREME COURT ADHERING TO ITS FORMER FINAL ORDER WAS PROPER, WHERE THE LOWER COURT HAD NO AUTHORITY TO DETERMINE WHETHER COMPLIANCE WITH THE VOTING RIGHTS ACT WAS REQUIRED, AND THE ATTORNEY GENERAL HAD NO AUTHORITY TO OVERRULE THE PRIOR MISSISSIPPI SUPREME COURT DECISION.

From the institution of this case in federal district court through litigation in the Mississippi state court system,

the Repondents, as concerned citizens of Winston County, have sought to compel the election of the previously appointed local Board of Trustees. At each stage of the proceedings the Petitioners, incumbent office holders, have sought to defeat or delay the election, first alleging state constitutional violations and then a violation of the Voting Rights Act. The present action certainly does not fit the scenario contemplated by 42 U.S.C. § 1973c, which becomes relevant "whenever a state or political subdivision . . . shall enact or seek to administer" any covered change. It has been private litigants, and not the Petitioners, who have sought to bring about or administer the change from appointed to elected officials.

The Petitioners maintain that the Supreme Court of Mississippi "does not have authority to order non-compliance

with the Voting Rights Act especially since . . . the United States Department of Justice had . . . issued its legally unenforceable letter . . . ." (Pet. Brief at 4.) Respondents answer initially that the decision of the Supreme Court of Mississippi, as discussed supra, in no respect constitutes the ordering of noncompliance with the Voting Rights Act. In addition, a necessary corollary to the proposition that a state supreme court does not have authority to order noncompliance is that the lower state court had no authority to order compliance. In this case, the chancery court did, however, determine that the election had to comply with the Voting Rights Act.

With respect to judicial involvement under the Voting Rights Act, "Congress intended to treat 'coverage' questions differently from 'substantive discrimination'

questions." Allen v. State Board of Elections, 393 U.S. 544, 559 (1969). By the very provisions of the statute, however, it is evident that Congress intended all questions to be resolved in federal court. The substantive discrimination questions are reserved for the federal district court for the District of Columbia, while the underlying question of coverage, in a suit brought by a private litigant or the Attorney General, is to be decided by a local three-judge federal district court. United States v. Warren County Board of Supervisors, 429 U.S. 642, 645-46 (1977). The question of coverage involves several determinations. Whether the public body is a "political subdivision," whether the proposed change is within the meaning of a "voting qualification . . . standard, practice, or procedure," and whether the change was "in force or effect on November 1, 1964" are all

questions which must be resolved to reach the ultimate question of coverage. These questions, all matters of federal law, are patently not suited for a lower state court. The chancery court is not empowered to make this determination under the Voting Rights Act. While the actions of the lower state court in this case were improper, an even more ominous possibility exists if that court can determine the question of coverage. The state court could erroneously decide that compliance with section five was, as a matter of substantive law, unnecessary. Significant election changes could be allowed which would violate the principles intended to be protected by the Act. The resolution of the question of coverage must be reserved for the local federal court.

It is not, of course, always necessary to have a judicial declaration of "coverage"

before section five is applied. The state or political subdivision can institute an action in the Federal District Court for the District of Columbia for a declaratory judgment that the proposed change has no discriminatory purpose or effect. The proposed change may also be initially submitted to the Attorney General. Presumably, Petitioners, in their capacity as private individuals, could also have asked the federal district court to determine the question of coverage. Petitioners did not opt for any of these alternatives. Although submission to the Attorney General was made, it was only after the chancery court decided that the Act was applicable and ordered the submission. The chancery court was without authority to make the determination, and the Supreme Court of Mississippi was correct in not affirming the lower court's decision.

The Petitioners also attach significance to the fact that the decision under review came after the Attorney General's letter objecting to the election. In actuality, the letter was subsequent to the first Mississippi Supreme Court decision which ordered the election. By arguing that the state supreme court should have changed its prior decree because of the Attorney General's objection, Petitioners argue that, in effect, the Attorney General can overrule a decision of the Supreme Court of Mississippi. The Voting Rights Act does not entail such an extensive grant of power.

In McDaniel v. Sanchez, ___ U.S. ___, 101 S. Ct. 2224 (1981), the county submitted a new reapportionment plan to the federal district court which had found the existing apportionment plan unconstitutional. The court entered an order approving the new plan, and holding as a matter of

law that the Voting Rights Act did not require preclearance. The Court of Appeals for the Fifth Circuit reversed, finding that preclearance was required. On appeal, the Supreme Court affirmed, holding that a plan which reflects the policy choices of the elected representatives of the people does not constitute a court-ordered plan exempt from preclearance. 101 S. Ct. at 2238. The decision in McDaniel does not support the proposition, implicit in Petitioner's brief, that the United States Attorney General may veto the final judgment of a state supreme court by issuing an objection under the Voting Rights Act.

If the Attorney General believes that there is, or has been, a violation of the Voting Rights Act, he may seek preventive or injunctive relief in federal court. 42 U.S.C. § 1973j(d). While the Attorney General may prevent a state

or political subdivision from implementing a voting change by interposing an objection, there is no indication that Congress vested him with power to supersede final state court judgments by issuing a pre-clearance letter. If the Attorney General could "overrule" the final judgment of a state supreme court, any opinion interpreting state election laws would not be final in the true sense until the Attorney General had voiced his opinion.

The opinion in McDaniel involved a federal court order which included a decision on the preclearance question, and not a state court order to comply with state law, such as exists in this case. If federal interests warrant an intrusion on the principles of federal-state comity, by the modification of a final state court decree, that intrusion should not be in the guise of a letter

from the Attorney General. Congress has vested jurisdiction over questions regarding the Voting Rights Act in federal court, and the United States Department of Justice has brought suit there over this election. That action will produce a more complete record worthy of review, as opposed to a state court proceeding wherein the Voting Rights Act is interjected at a late stage. The Chancery Court of Winston County erred in determining the question of compliance with the Voting Rights Act, and the Supreme Court of Mississippi properly refused to enforce that portion of the decree.

CONCLUSION

The Supreme Court of Mississippi was correct in refusing to enforce that portion of the chancery court's decree which called for compliance with the Voting Rights Act. For the reasons

cited herein, Respondents respectfully request that the writ of certiorari be dismissed as improvidently granted, or in the alternative, that the decision below be affirmed. If the Court finds that reversal of the decision is necessary, Respondents request that any relief be prospective in nature, allowing the election of December 5, 1981, to remain unaffected.

Respectfully submitted,

Laurel G. Weir
(Counsel of Record)
Post Office Box 156
Philadelphia, MS 39350
(601) 656-1931
Attorney for Respondents

CERTIFICATE OF SERVICE

I, Laurel G. Weir, attorney for Respondents, do hereby certify that I have this day served three (3) true and correct copies of the foregoing Brief for the Respondents, to the following:

James C. Mayo
Fair & Mayo
Post Office Box 509
Louisville, MS 39339
Attorneys for Petitioners

Rex E. Lee
Solicitor General
Department of Justice
Washington, DC 20530

This, the 24th day of February 1982.

_____

Laurel G. Weir

Amicus Brief

United States

Office - Supreme Court, U.S.
FILED
FEB 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-451

In the Supreme Court of the United States

OCTOBER TERM, 1981

RALPH HATHORN, ET AL., PETITIONERS

v.

MRS. BOBBY LOVORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JOAN A. MAGAGNA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in a suit brought by private citizens seeking the enforcement, for the first time, of a 1964 state statute changing the electoral system for the Board of Trustees of the Louisville, Mississippi, Municipal Separate School District, the Mississippi Supreme Court erred in ordering implementation of the statute without preclearance under Section 5 of the Voting Rights Act of 1965.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	10
Argument	12
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544 ..... 15, 16
Atlantic Coast Line R. R. v. *Powe*, 283 U.S. 401 12
Brown v. *Allen*, 344 U.S. 443 ..... 12, 13
Chessman v. *Teets*, 354 U.S. 156 13
Cincinnati Street Ry. v. *Snell*, 179 U.S. 395 13
Connor v. *Johnson*, 402 U.S. 690 18
Dougherty County Board of Education v. *White*, 439 U.S. 32 ..... 11, 14, 15
East Carroll Parish School Board v. *Marshall*, 424 U.S. 636 18
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 ..... 12, 13
House v. *Mayo*, 324 U.S. 42 12
Hughes Tool Co. v. *Trans World Airlines*, 409 U.S. 363 ..... 10, 12, 13
Laclede Gas Light Co. v. *Public Service Commission*, 304 U.S. 398 13
McDaniel v. *Sanchez*, No. 80-180 (June 1, 1981) 11, 15, 17, 18, 19
Mercer v. *Theriot*, 377 U.S. 152 13
Perkins v. *Matthews*, 400 U.S. 379 ..... 11, 15, 16, 17, 19
Reece v. *Georgia*, 350 U.S. 85 ..... 10, 13
South Carolina v. *Katzenbach*, 383 U.S. 301 14
Stone v. *Powell*, 428 U.S. 465 14
United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 15
United States v. *Board of Supervisors*, 429 U.S. 642 14

Cases—Continued Page

United States v. *Carver*, 260 U.S. 482 12
Urie v. *Thompson*, 337 U.S. 163 13
Wade v. *Mayo*, 334 U.S. 672 12
Wise v. *Lipscomb*, 437 U.S. 535 18

Constitution, statutes and regulations:

Miss. Const., Art. 4, § 90 4
Voting Rights Act of 1965, Section 5, 42 U.S.C. 1973c ..... *passim*

Miss. Ann. Code:

§ 37-5-1 (1972) 8
§ 37-7-1 (1972) 2
§ 37-7-203 (Supp. 1981) 3, 4, 5, 12, 17
§ 37-7-209 (Supp. 1981) 6
§ 37-7-217 (Supp. 1981) 6, 8, 12
§ 37-7-701 (1972) 8
§ 37-7-717(a) (1972) 8

1953 Miss. Laws Extra. Sess. ch. 12, §§ 7(b) and 9(c) 7
1964 Miss. Laws ch. 391 16
28 C.F.R. 51.4 14
28 C.F.R. 51.4(a) 15

Miscellaneous:

30 Fed. Reg. 9897 (1965) 14
46 Fed. Reg. 870 *et seq.* (1981) 18
46 Fed. Reg. 872 (1981) 18
Mississippi Official and Statistical Register (1980-1984) 8
S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975) 15
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 13

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-451

RALPH HATHORN, ET AL., PETITIONERS

v.

MRS. BOBBY LOVORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case raises a question concerning the application of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The Attorney General has authority under Section 5 to review changes in election procedures submitted by covered jurisdictions in order to determine whether such changes have been shown to have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. The Attorney General also has authority under the Act to initiate suits to prevent implementation of changes in election laws prior to compliance with the preclearance procedures of Section 5. Indeed, pursuant to his authority under Section 5, the Attorney

General entered an objection to the voting change at issue in this case on March 28, 1980 (Pet. App. A3, A7-A9). On December 1, 1981, the United States filed suit in the United States District Court for the Northern District of Mississippi seeking to enjoin implementation of the voting change involved here because it has not been precleared under Section 5.[1] The Court's resolution of the question presented by this case thus will directly affect the Attorney General's statutory responsibilities. The United States has previously participated either as a party or as amicus curiae in virtually all cases in this Court involving the Voting Rights Act.

STATEMENT

1. This case involves the electoral system for the Board of Trustees of the Louisville, Mississippi, Municipal Separate School District.[2] Since 1960, the Louisville School District has been the only school dis-

---

[1] On December 4, 1981, the district court denied the United State's application for temporary restraining order seeking to prevent the application of the voting change, insofar as it incorporates a majority vote requirement (see pages 7-8 and note 11, *infra*), in the election held December 5, 1981.

[2] School districts in Mississippi are divided into three general categories. "Municipal separate school districts" are districts that include the territory within the corporate limits of a municipality or both the territory within the corporate limits and "added territory" outside the corporate limits. "County-wide school districts" are districts that include all of the territory of a county exclusive of any territory embraced within a municipal separate school district. All school districts that do not fit within the first two categories, including school districts embracing territory in two or more counties, are known as "consolidated school districts." Miss. Code Ann. § 37-7-1 (1972).

trict in Winston County, Mississippi, and has covered all of Winston County. As of 1978, the population of Winston County was approximately 18,400, with approximately 7,000 persons living within the City of Louisville. Two thousand six hundred and seventy-five of the pupils in the school district resided outside Louisville and 1,418 pupils lived within the city limits (J.A. 7-8). Until implementation of the voting change at issue in this case, three of the members of the five-member Board of Trustees were appointed by the Mayor of Louisville and the city aldermen.[3] The other two members were elected at-large by the qualified electors of the school district residing outside the city (Pet. App. A2; J.A. 8).

In 1964, the Mississippi legislature enacted the provision now codified in Miss. Code Ann. § 37-7-203 (Supp. 1981). Section 37-7-203 provides, in pertinent part:

> The boards of trustees of all municipal separate school districts created under the provisions of Article I of this chapter, either with or without added territory, shall consist of five (5) members, each to be chosen for a term of five (5) years, but so chosen that the term of office of one (1) member shall expire each year. * * * [I]n any county in which a municipal separate school district embraces the entire county in which Highways 14 and 15 intersect, one (1) trustee shall be elected from each supervisors district.

It is not disputed that Winston County is the only county in Mississippi in which Highways 14 and 15

---

[3] The Mayor and Board of Aldermen of Louisville are elected by the qualified electors residing within the corporate limits of the city.

intersect (49,446 R. 57-58; J.A. 8).[4] The statute was not implemented because, in the view of local officials, it was invalid under a provision of the Mississippi Constitution that prohibits local, private or special legislation.[5]

2. In 1975, respondents, five adult citizens of Winston County residing outside Louisville, filed this action in the Chancery Court of Winston County,[6] seeking to enforce the 1964 statute's provision for election of one trustee from each supervisor's district (49,446

---

[4] "49,446 R." refers to the record of this case from the filing of the complaint to the Mississippi Supreme Court's first decision. "52,758 R." refers to the record following the Mississippi Supreme Court's first remand of the case to the Chancery Court.

[5] Miss. Const. Art. 4, § 90 provides, in relevant part:

> The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:
>
> * * * * *
>
> (*p*) Providing for the management or support of any private or common school, incorporating the same, or granting such school any privileges * * *.

[6] Respondents initially filed suit in federal court. The United States District Court for the Northern District of Mississippi abstained, staying the federal court proceedings in order to give the Mississippi state courts an opportunity to construe § 37-7-203, but retaining jurisdiction pending the state court proceedings (49,446 R. 10-11). Following the Mississippi Supreme Court's first decision and pursuant to a notice of voluntary dismissal by stipulation filed by the parties, the district court dismissed the federal action without prejudice (52,758 R. 236). Respondent's motion to reinstate the federal case (52,758 R. 250-252) was denied on August 25, 1980.

R. 1-5).[7] Respondents named as defendants the City of Louisville, its mayor, other city officials, the school superintendent, the incumbent members of the board of trustees and Winston County election officials. The Chancery Court dismissed respondents' complaint, holding that the reference in § 37-7-203 to the intersection of Highways 14 and 15, which singled out Winston County, "has no relationship whatsoever to the means of electing Trustees for the School District," and therefore rendered that statute's provision for single-member districts violative of the Mississippi Constitution's prohibition of local, private or special legislation (see note 5, *supra*) (49,446 R. 109-128).

The Mississippi Supreme Court reversed (J.A. 6-18). That court held (*id.* at 14) that while § 37-7-203's reference to the intersection of Highways 14 and 15 was unconstitutional, the statute's other criterion—that a municipal separate school district embrace the entire county—was "rational and germane" to the subject matter of the statute—the system for electing members of the boards of trustees of municipal separate school districts. Accordingly, the court left standing the statute's requirement that one member of the board of trustees be elected from each supervisor's district "in any county in which a municipal separate school district embraces the entire county."[8] The Mississippi Supreme Court remanded

---

[7] The complaint also alleged that the electoral system then in force violated the one person-one vote principle. That issue is not before the Court.

[8] The Chancellor also had considered striking only the geographical reference, but he had rejected that notion out of deference for what he viewed as the intent of the Mississippi legislature (49,446 R. 118-119): "to delete the reference

the case to the Chancery Court for further proceedings not inconsistent with its opinion.

In a petition for rehearing, petitioners first raised the question of the applicability of Section 5 of the Voting Rights Act. Although the Mississippi Supreme Court amended its opinion to correct factual errors, the court denied the petition for rehearing without mention of the Section 5 issue. This Court denied a petition for a writ of certiorari. 441 U.S. 946 (1979).

3. On remand, the Chancery Court ordered that an election be held pursuant to the 1964 state statute, as redacted by the Mississippi Supreme Court, and it set forth detailed procedures to govern the conduct of that election (52,758 R. 139-147). In particular, the Chancellor ordered that all five members of the Board of Trustees of the school district were to be elected by the qualified electors of Winston County, "with one to be elected from each supervisor's district and the qualified electors of each supervisor's district to vote only on the trustee for the district in which they reside" (*id.* at 142). The court also directed (*id.* at 143) that "[i]f no candidate receives a majority of the vote cast at any of said elections * * *, a runoff election shall be held * * * two weeks later * * * as provided by statute.[9] The runoff shall be between

---

to Highways 14 and 15 would have the effect of applying it potentially to several other counties, and since this was not the intent of the Legislature, this Court will not take the position that the Act is still in force as to all Counties where the Municipal Separate School District encompasses the entire county."

[9] Miss. Code Ann. § 37-7-217 (Supp. 1981), which governs the conduct of elections for boards of trustees of municipal separate school districts (see Miss. Code Ann. § 37-7-209 (Supp. 1981)), provides, in relevant part, that "[i]f a person

the two candidates receiving the highest vote [in the first election]" (*id.* at 143). Finally, the Chancellor held (*id.* at 141) that "[t]he election of all five trustees of the Louisville Municipal Separate School District is a substantial change from the method heretofore used for the selection of said trustees." Accordingly, he ordered petitioners to submit the proposed voting change, as detailed in his decree, to the Attorney General of the United States for preclearance under Section 5 of the Voting Rights Act of 1965 (*id.* at 146-147).

Petitioners then submitted the voting change to the Attorney General (52,758 R. 148-150, 163-164).[10] On March 28, 1980, the Attorney General filed an objection to the proposed election plan insofar as it required the trustees to obtain a majority of the votes cast in their districts (Pet. App. A7-A9; 52,758 R. 237-240). The Attorney General explained (Pet. App. A8) that because blacks constituted approximately

---

shall not receive a majority of the votes cast upon the first ballot, a runoff shall be held between the two (2) persons receiving the highest number of votes upon such first ballot, which said runoff shall be held two (2) weeks thereafter." Under the prior electoral system, the two elected trustees also had been subject to the majority-vote requirement (1953 Miss. Laws Extra. Sess. ch. 12, §§ 7(b) and 9(c)).

[10] The Chancellor first scheduled the elections for the five trustee posts for December 1, 1979, with any necessary runoff elections to be held on December 15, 1979 (52,758 R. 139-147). When, following petitioners' initial submission to the Attorney General (*id.* at 148-150), he requested additional information (*id.* at 155-157), the Chancellor stayed and suspended his prior orders calling for the elections "pending the consideration by the United States Department of Justice of the change in the voting procedures pursuant to Section 5 of the Voting Rights Act of 1965 as amended" (*id.* at 159).

39% of the population of Winston County but did not comprise a majority in any of the five supervisor's districts from which the trustees were to be elected, because there appeared to be a general pattern of racially polarized voting in the county, and because no black ever had been elected or appointed to the school board, the board of supervisors or the Louisville Board of Aldermen, he could not find, "as we must under the Voting Rights Act, that the special application of a majority vote requirement for the election of county-wide school board members in Winston County will not have a discriminatory effect." [11]

---

[11] The Attorney General's reference to the "special" application of the majority-vote requirement to the school district in Winston County is to the fact that the Louisville Municipal Separate School District is the only school district in Mississippi that occupies an entire county to which the majority-vote requirement is statutorily applicable. Except for three, all of the school districts in Mississippi that occupy entire counties are "county-wide school districts" (see note 2, *supra*), each of whose 5 members is elected from one supervisor's district by a plurality or more of the vote (Miss. Code Ann. § 37-5-1 (1972)). Because Winston County's school district is denominated a "municipal separate school district" (see note 2, *supra*), however, it is governed by Miss. Code Ann. § 37-7-217's majority-vote requirement (see note 9, *supra*). The two other school districts in Mississippi that occupy the entire area of a county but are not classified as "county-wide school districts" are the Grenada Municipal Separate School District and the Adams Special Municipal Separate School District (see Miss. Code Ann. § 37-7-701 (1972)). We are advised by Dr. Gordon Walker, superintendent of the Grenada school district, that three members of its board of trustees are appointed by Grenada's city council and two members are appointed by the county board of supervisors. The members of the Adams County Board of Education also are appointed (*Mississippi Official and Statistical Register* 200 (1980-1984); see Miss. Code Ann. § 37-7-717(a) (1972)).

Respondents next sought to join the Attorney General as a party defendant (52,758 R. 108-118). The Chancery Court denied that motion (*id.* at 119-120, 249), and subsequently entered a final decree (J.A. 25-26) holding that state law required the runoff procedure, that the Chancery Court has no authority to order the Attorney General to preclear the election, and that the court's prior decree calling for the election would "remain in force subject to compliance with the Federal Voters Right Act [*sic*] as previously ordered by this Court" (*id.* at 26). Respondents took a second appeal.

The Mississippi Supreme Court, declaring (Pet. App. A4-A5) that its "prior decision, which the United States Supreme Court declined to reverse or alter in any respect, became and is the law of the case," reversed that part of the Chancery Court's decree that required compliance with Section 5 of the Voting Rights Act (*id.* at A5). The court thus left standing that part of the Chancellor's decree that called for a majority vote and, if necessary, runoff elections (*ibid.*).

On remand, the Chancery Court ordered the incumbent members of the Board of Trustees to conduct an election on December 5, 1981, "without submission to the Attorney General, and without regard to the directives heretofore received from the United States Attorney General, dated March 28, 1980" (decree of Aug. 4, 1981).[12]

---

[12] The Chancery Court, the Mississippi Supreme Court, and this Court, with Justices Brennan, Marshall, Blackmun and Stevens dissenting, denied motions for a stay of the December 5 election. Petitioner Thomas W. Saterfiel, Superintendent of the Louisville Municipal Separate School District, has informed us that the election was held on December 5, 1981,

SUMMARY OF ARGUMENT

1. The Mississippi Supreme Court's rejection of the Chancery Court's conclusion that Section 5 preclearance is required here apparently is premised on the state supreme court's belief that this Court's denial of a petition for a writ of certiorari from its first judgment rendered that judgment "the law of the case" (Pet. App. A5). A denial of certiorari, however, "imparts no implication or inference concerning the court's view of the merits." *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973).

Moreover, the Section 5 issue was not argued to the Mississippi Supreme Court prior to its first decision in this case, and its opinion on the first appeal made no mention of it. The court's remand of the case for further proceedings thus in no way precluded the subsequent application of Section 5. In these circumstances, the prior petition for a writ of certiorari raising the Section 5 issue was not necessary, and review by this Court at that interlocutory stage would have been premature. It therefore remains open to this Court "to consider all of the substantial federal questions determined in the earlier stages of the litigation." *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955).

2. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides that whenever certain covered jurisdictions "shall enact or seek to administer any * * * standard, practice or procedure with re-

---

as ordered, and that no candidate received a majority of the vote in any of the five races and, accordingly, runoff elections were held on December 19. He further informs us that, although one black candidate received a plurality of the votes in one of the races held on December 5, he was defeated in the runoff election. The record, of course, does not reflect these recent developments.

spect to voting different from that in force or effect on November 1, 1964," they must first submit such voting change for preclearance by the Attorney General of the United States or the United States District Court for the District of Columbia. Section 5 covers "all changes affecting voting." *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 43 (1978).

It is not disputed that Mississippi is a covered jurisdiction. Moreover, the change effected by the 1964 Mississippi state statute—from an electoral system whereby three members of a school district's board of trustees were appointed and two were elected at-large, to a system whereby all five members are elected from single-member districts—clearly is a change affecting voting. Because the voting change at issue here was not "*in fact* 'in force or effect' * * * on November 1, 1964 * * *" (*Perkins* v. *Matthews*, 400 U.S. 379, 395 (1971); emphasis in original), it is subject to Section 5's preclearance requirement notwithstanding that the state statute was promulgated prior to November 1, 1964.

Finally, the voting change at issue here was "s[ought] to [be] administer[ed]" within the meaning of Section 5. The 1964 Mississippi state statute clearly was a "legislative" plan, which "reflect[ed] the policy choices of the elected representatives of the people." *McDaniel* v. *Sanchez*, No. 80-180 (June 1, 1981), slip op. 22. Moreover, by making the submissions to the Attorney General and by conducting the December 5 election, the then incumbent trustees "s[ought] to administer" the voting change. As *McDaniel* v. *Sanchez* makes clear, the fact that they did so under court order is irrelevant for purposes of Section 5.

ARGUMENT

THE MISSISSIPPI SUPREME COURT ERRED IN ORDERING IMPLEMENTATION OF A LEGISLATIVE VOTING CHANGE THAT HAD NOT BEEN PRECLEARED AS REQUIRED BY SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

1. The Mississippi Supreme Court offered no explanation or analysis for its rejection of the Chancery Court's conclusion that Section 5 preclearance was required, except to state (Pet. App. A4-A5) that Miss. Code Ann. § 37-7-203 (Supp. 1981), which incorporates by reference the majority vote requirement of § 37-7-217, had been before it and before this Court on the previous petition for a writ of certiorari, and that because this Court had "declined to reverse or alter in any respect" the state supreme court's first judgment, that judgment "became and is the law of the case" (Pet. App. A4). In the first place, even if the Mississippi Supreme Court had expressly ruled on the Section 5 issue, this Court's denial of certiorari could not be construed as an affirmation of the Mississippi Supreme Court's judgment. It is "well-settled * * * that denial of certiorari imparts no implication or inference concerning the Court's view of the merits." *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973). Accord, *Brown* v. *Allen*, 344 U.S. 443, 491-492 (1953) (Frankfurter, J.); *Wade* v. *Mayo*, 334 U.S. 672, 680 (1948); *House* v. *Mayo*, 324 U.S. 42, 48 (1945) (per curiam); *Atlantic Coast Line R.R.* v. *Powe*, 283 U.S. 401, 403-404 (1931); *United States* v. *Carver*, 260 U.S. 482, 490 (1923); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916).

More importantly, however, the Mississippi Supreme Court's first opinion included no reference to

Section 5. The question had not been raised in the Chancery Court and none of the parties briefed the issue in the Mississippi Supreme Court prior to its decision. As noted above (page 6, *supra*), the question was mentioned only in a petition for rehearing, which the Mississippi Supreme Court denied without comment. Accordingly, the Mississippi Supreme Court's first remand of the case "for further proceedings" was not at all inconsistent with the expectation that the voting change would be submitted for preclearance under Section 5, which, in fact, the Chancery Court ordered. Because the state supreme court's first judgment thus contemplated further proceedings that could have eliminated the Section 5 issue from the case, a request for intervention by this Court at that stage of the proceedings was not necessary, and review by this Court at that interlocutory stage would have been premature. See *Urie* v. *Thompson*, 337 U.S. 163, 171-172 (1949); *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U.S. 398 (1938); *Cincinnati Street Ry.* v. *Snell*, 179 U.S. 395 (1900); R. Stern & E. Gressman, *Supreme Court Practice* 183 (5th ed. 1978). In these circumstances, this Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, * * * and [its] right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case." *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955) (citation omitted). Accord, *Hughes Tool Co.*, *supra*, 409 U.S. at 365 n.1; *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964) (per curiam); *Chessman* v. *Teets*, 354 U.S. 156, 164 n.13 (1957); *Brown* v. *Allen*, *supra*, 344 U.S. at 494 (Frankfurter, J.); *Hamilton-Brown Shoe Co.*, *supra*, 240 U.S. at 258-259.

2. The Mississippi Supreme Court erred in ordering petitioners to implement the state statute without complying with Section 5 of the Voting Rights Act. "State courts, like federal courts, have a constitutional obligation * * * to uphold federal law." *Stone* v. *Powell*, 428 U.S. 465, 494 n.35 (1976). As we show below, in the present case federal law requires Section 5 preclearance.

a. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides that whenever certain designated jurisdictions "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," they must first submit such voting change to the United States District Court for the District of Columbia for a declaratory judgment or to the Attorney General for a determination that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." Failure to obtain such federal preclearance renders a voting change unenforceable. *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 46 (1978); *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977) (per curiam); 28 C.F.R. 51.4.

Mississippi is among the designated jurisdictions whose voting changes are subject to the preclearance requirement of Section 5. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 318 (1966); 30 Fed. Reg. 9897 (1965). Accordingly, any changes affecting voting that are enacted or sought to be administered by the state itself or by local entities within the state, including the Louisville Municipal Separate School District (see *Dougherty County Board of Education* v.

White, supra, 439 U.S. at 46; cf. *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978)), must receive Section 5 preclearance in order to become effective.

b. "Section 5 applies to all changes affecting voting * * *." *Dougherty County Board of Education* v. *White, supra*, 439 U.S. at 43. See also *Allen* v. *State Board of Elections*, 393 U.S. 544, 566, 568, 570 (1969); 28 C.F.R. 51.4(a). The statute's coverage "is not dependent on a showing that [a] proposed plan is defective in any way. * * * The prophylactic purposes of the § 5 remedy are achieved by automatically requiring 'review of *all* voting changes prior to implementation by the covered jurisdictions.'" *McDaniel* v. *Sanchez*, No. 80-180 (June 1, 1981), slip op. 21 (citation omitted), quoting S. Rep. No. 94-295, 94th Cong., 1st Sess. 15 (1975) (emphasis by the Court).[13]

---

[13] Accordingly, the merit of the Attorney General's objection to the voting change at issue here is irrelevant to the present case. That question—"the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color'"—"is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General." *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971).

Nor is it significant that the feature of the new electoral system to which the Attorney General objected—the majority vote requirement—was also part of the previous appointive-elective system (see note 9, *supra*). *United States* v. *Sheffield Board of Commissioners, supra*, also involved an objection by the Attorney General to a feature of a new electoral system that had existed under the prior system—at-large elections (see 435 U.S. at 114-116). While no party in that case contended that there was no "change," this Court, in upholding the Attorney General's authority to object to the new system,

Under the electoral system that was in effect in Winston County from 1960 until December 1981, three members of the Board of Trustees of the Louisville Municipal Separate School District were appointed and two members were elected at-large. The change effected by the 1964 state statute—to a system whereby all five trustees are elected from single-member districts—constitutes a major alteration in the method of selection of the board of trustees. Hence, the new system clearly is a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *" (42 U.S.C. 1973c). Cf. *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 569-570 (Section 5 applies to a change from single-member to at-large districts and to a change making an important county office appointive instead of elective).

It is of no moment that the Mississippi statute was enacted prior to November 1, 1964,[14] since it was not implemented until after that date. *Perkins* v. *Matthews*, 400 U.S. 379 (1971), involved a 1962 statute that mandated a change from ward to at-large elections of all aldermen of the City of Canton, Mississippi. In the conduct of its 1965 municipal elections, however, Canton ignored the statute's mandate and elected its aldermen by wards, as it had done in 1961. When, in 1969, Canton for the first time attempted to enforce the statute, this Court held that preclearance was required, making clear that the ap-

---

implicitly found the at-large feature to be an appropriate subject for Section 5 preclearance. Similarly, because the voting change here creates an entirely new electoral system, the system as a whole is subject to Section 5 review.

[14] 1964 Miss. Laws ch. 391 was approved on June 11, 1964.

plicability of Section 5 depends on whether there is a change from the election procedure that was "*in fact* 'in force or effect' * * * on November 1, 1964 * * *" (400 U.S. at 395; emphasis in original). Similarly, in the present case, in which enforcement of the state statute was not even sought until the institution of this lawsuit in 1975, preclearance of the statute is required.

c. Petitioners "s[ought] to administer" the voting change at issue here within the meaning of Section 5 of the Voting Rights Act. *McDaniel* v. *Sanchez*, No. 80-180 (June 1, 1981), involved a reapportionment plan submitted to a federal district court by the legislative body of a covered jurisdiction in response to the court's determination that the existing apportionment of the jurisdiction's electoral districts was unconstitutional. In that case, this Court rejected the argument that, because the reapportionment plan was court-ordered, it was not subject to the preclearance requirement. Rather, the Court held (slip op. 22), Section 5 applies to all voting changes that "reflect[] the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them * * *." *McDaniel* makes clear that it is only in the exceptional circumstance in which a district court itself *fashions* the plan that Section 5's preclearance requirement would not apply.

In this case, as in *McDaniel*, the courts did not develop the voting change themselves.[15] Rather, the

---

[15] The Mississippi Supreme Court's mere deletion from § 37-7-203 of the reference to the intersection of Highways 14 and 15 (see page 5, *supra*), which had no impact on the electoral system itself, surely did not "change its character as a legislative plan" (*McDaniel* v. *Sanchez*, *supra*, slip op. 16).

Mississippi courts merely ordered the implementation of a statute previously enacted by the Mississippi state legislature.[16] Hence, there can be no doubt that the voting change involved here reflects the policy choice of the elected representatives of the citizens of Mississippi.

Nor is it significant that the legislation providing for the voting change was enacted by Mississippi prior to November 1, 1964 (see note 14, *supra*). Both by making the submissions to the Attorney General called for by Section 5 and by conducting the December 5, 1981 election, the then incumbent trustees "s[ought] to administer" the voting change. To be sure, the trustees took these actions at the instance of the Mississippi courts. *McDaniel* makes clear, however,

---

[16] This case thus does not present the question whether a voting change created by a state court is exempt from Section 5 coverage, as are voting changes "prepared and adopted" by the federal courts. *McDaniel* v. *Sanchez*, *supra*, slip op. 7; *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) (per curiam). This Court's prior decisions dealing with the applicability of Section 5 to court-ordered voting changes have involved only federal court orders. *McDaniel* v. *Sanchez*, *supra*; *Wise* v. *Lipscomb*, 437 U.S. 535 (1978); *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); *Connor* v. *Johnson*, *supra*. Because the Section 5 preclearance procedure was adopted to protect "[t]he *federal* interest in preventing *local* jurisdictions from making changes that adversely affect the rights of minority voters" (*McDaniel* v. *Sanchez*, *supra*, slip op. 19; emphasis added), significantly different considerations would be involved in determining whether the exemption for court-created plans should be extended to voting changes "prepared and adopted" by state courts.

The recently promulgated Department of Justice Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 46 Fed. Reg. 870 *et seq.* (1981), do not address the issue of Section 5 coverage of voting changes "resulting from orders of State courts" (*id.* at 872).

that whether such actions are taken voluntarily or under court order is irrelevant for purposes of Section 5.

CONCLUSION

The judgment of the Mississippi Supreme Court should be reversed.[17]

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JOAN A. MAGAGNA
Attorneys

JANUARY 1982

---

[17] The Mississippi courts may take further action with respect to the voting change or the election consistent with this Court's reversal, but specific instructions are not required. The matter is now before a federal district court in the suit brought by the United States (see page 2, *supra*). That court has authority to set aside the December 5, 1981 election, if necessary, and to order that future elections be held under voting procedures which have been precleared under Section 5. *Perkins* v. *Matthews*, *supra*, 400 U.S. at 395-397. It also has authority to order interim relief if Section 5 preclearance is not promptly obtained. *McDaniel* v. *Sanchez*, *supra*, slip op. 22-23 n.35.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 365880 783

Supplemental Brief for the United States

BNA LAW REPRINTS EDITOR'S NOTE: THE MOTION TO FILE THE SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE WAS DENIED BY THE COURT ON APRIL 19, 1982, BUT IS INCLUDED HERE IN THE INTEREST OF A COMPLETE RECORD.

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-451

In the Supreme Court of the United States

OCTOBER TERM, 1981

RALPH HATHORN, ET AL., PETITIONERS

v.

MRS. BOBBY LOVORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544 ..... 6, 7

Central Union Telephone Co. v. *Edwardsville*, 269 U.S. 190 5

Charleston Federal Savings & Loan Association v. *Alderson*, 324 U.S. 182 3

City of Rome v. *United States*, 446 U.S. 156 ..... 6, 7

Dougherty County Board of Education v. *White*, 439 U.S. 32 ..... 6, 8

Forgay v. *Conrad*, 47 U.S. (6 How.) 201 2

Hauenstein v. *Lynham*, 100 U.S. 483 8

Henry v. *Mississippi*, 379 U.S. 443 5

Michel v. *Louisiana*, 350 U.S. 91 5

New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 4

Parker v. *Illinois*, 333 U.S. 571 5

Perkins v. *Matthews*, 400 U.S. 379 7

Quern v. *Jordan*, 440 U.S. 332 4

Rigdon v. *General Box Co.*, 162 So.2d 863 5

Rio Grande Western Ry. v. *Stringham*, 239 U.S. 44 3

Page

Cases—Continued:

St. Louis I. Mt. & So. Ry. v. *Starbird*, 243 U.S. 592 4

South Carolina v. *Katzenbach*, 383 U.S. 301 ..... 6, 7

Staub v. *City of Baxley*, 355 U.S. 313 5

Stone v. *Powell*, 428 U.S. 465 8

United States v. *Board of Supervisors*, 429 U.S. 642 ..... 6, 8

Wise v. *Lipscomb*, 437 U.S. 535 6

Constitution and statutes:

United States Constitution:

Article VI, Clause 2 (Supremacy Clause) 7

Fourteenth Amendment (Equal Protection Clause) 7

Fifteenth Amendment 6

Voting Rights Act of 1965, Section 5, 42 U.S.C. 1973c 1, 2, 4, 6, 7, 8

Miss. Code Ann. (Supp. 1981);

§ 37-7-203 7

§ 37-7-217 4

Miscellaneous:

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 2-3

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-451

RALPH HATHORN, ET AL., PETITIONERS

v.

MRS. BOBBY LOVORN, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The Solicitor General, on behalf of the United States, moves for leave to file the attached supplemental brief in support of petitioners.

The United States has a very substantial interest in this case, which involves the enforcement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Accordingly, the United States, as amicus curiae, has filed a merits brief in support of petitioners, and petitioners have ceded 15 of their 30 minutes of oral argument time to the United States.*

In their brief on the merits, respondents have raised a procedural issue that was neither apparent from the face of

---

* By order of February 22, 1982, the Court granted our motion for leave to participate in oral argument as amicus curiae and for divided argument.

the Mississippi Supreme Court's opinion nor adverted to in the brief in opposition to the petition for a writ of certiorari. We believe that our written commentary on this question will contribute to elucidation of the issues before the Court.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-451

RALPH HATHORN, ET AL., PETITIONERS

v.

MRS. BOBBY LOVORN, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

In the decision under review (Pet. App. A1-A5), the Mississippi Supreme Court struck down a lower state court's order requiring that an election procedure be precleared, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The Mississippi Supreme Court stated (Pet. App. A4-A5) that its ruling was based on a determination that an earlier decision rendered by it, which called for an election under the challenged election procedure, had established the "law of the case" on this issue.[1]

---

[1]In the earlier decision, the Mississippi Supreme Court had determined that a state statutory election procedure, as construed by that court, was lawful under the state constitution. In a petition for rehearing, petitioners had argued that they could not implement the procedure because it was a voting change within the meaning of Section 5 of the Voting Rights Act and had not been precleared, as required by that statute. The court denied the petition for rehearing without comment on the Section 5 issue. This Court denied a petition for a writ of certiorari. 441 U.S. 946 (1979).

Therefore, the court concluded (*id.* at A5), the lower court erred in requiring preclearance of the election procedure.

This supplemental brief addresses respondents' alternative contentions (1) that this Court should dismiss the writ of certiorari as improvidently granted because adequate and independent state grounds exist to support the judgment below, and (2) that the state court properly refused to apply the Voting Rights Act because claims under that statute are cognizable only in federal courts.

1. Respondents concede (Br. 11) that "a [state] court's reliance on the state ground of the established 'law of the case' does not necessarily preclude Supreme Court review." They nonetheless contend (Br. 7-18) that the first decision of the Mississippi Supreme Court in this case was a final judgment subject to review by this Court and that, therefore, on review of the second state supreme court decision this Court is precluded from considering issues that could have been raised on review of the initial decision. There is no merit to this claim.

In the first place, contrary to respondents' assertion (Br. 15), the Mississippi Supreme Court's first remand of the case was not for merely ministerial proceedings. Rather, as we have pointed out (U.S. Br. 13), the first remand of the case "for further proceedings" was not at all inconsistent with a subsequent submission of the voting change for preclearance under Section 5, which might have eliminated the Section 5 issue from the case entirely.

Moreover, simply because a party *may* seek review of a decision that contemplates further proceedings of only a ministerial nature (see *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848)), it does not follow that a party *must* do so on pain of forfeiting any right to review of the decision. See R. Stern & E. Gressman, *Supreme Court Practice* 191-192

(5th ed. 1978). None of the cases relied on by respondents (Br. 11-18) is to the contrary.[2]

In any event, in the present case petitioners did not simply permit the time in which to seek review of the first decision to pass and wait to raise the Voting Rights Act in a petition for a writ of certiorari from the second judgment. Rather, petitioners did all they could to bring the federal question to this Court's attention at the earliest possible opportunity, but the Court denied their petition for a writ of certiorari from the Mississippi Supreme Court's first judgment. 441 U.S. 946 (1979). At least in these circumstances, where it is due to no fault of those seeking review that the federal issues were not considered at the earlier stage, these issues remain open to plenary review by the Court once the case has again proceeded through the state courts.

2.*a*. Respondents next urge (Br. 18-22), as an adequate and independent state ground supporting the judgment below, petitioners' failure to raise the Voting Rights Act issue until their petition for rehearing following the Mississippi Supreme Court's first decision. It is well settled, however, that regardless of any procedural inadequacies in the presentation of a federal question to a state's highest court, "when such question appears to have been actually considered and decided by that court" this Court also may reach the issue. *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 186 (1945); see R. Stern & E. Gressman, *supra*, at 213. Indeed, the state court need not have expressly ruled on the merits of a federal claim so long

---

[2]In *Rio Grande Western Ry.* v. *Stringham*, 239 U.S. 44 (1915), the only case on which respondents rely in which the Court in fact held that a second judgment was nonreviewable (*id.* at 47), the Court also had before it the first judgment and was able to, and did, take the case on that basis. Such unusual circumstances are not authority for precluding a litigant from judicial review altogether.

as denial of the claim is the necessary effect of its judgment. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *St. Louis I. Mt. & So. Ry.* v. *Starbird*, 243 U.S. 592, 599 (1917). Here, contrary to respondents' bare assertions (Br. 7, 19), the more reasonable interpretation of the Mississippi Supreme Court's second decision (Pet. App. A1-A5) is that it struck down the Chancery Court's order insofar as it subjected the election procedure to preclearance under Section 5 of the Voting Rights Act because such a requirement was inconsistent with the state supreme court's previous decision holding Section 5 inapplicable to the challenged voting procedure.

The following language from the Mississippi Supreme Court's second decision is revealing (Pet. App. A4-A5):

> Our prior decision, which the United States Supreme Court declined to reverse or alter in any respect, became and is the law of the case. The very code section, Mississippi Code Annotated § 37-7-203 (Supp. 1980), central to our prior opinion, provides that the election shall be "in the same manner as is provided for the election of trustees of school districts other than municipal separate school districts having territory in two or more counties." The language just quoted refers to Mississippi Code Annotated § 37-7-217 (Supp. 1980), which provides that a majority vote shall be required in such an election.

In the first place, "[t]he doctrine of law of the case comes into play only with respect to issues previously determined." *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). Accordingly, the Mississippi Supreme Court's invocation of the doctrine belies the assertion that the court had not previously resolved the Section 5 issue. So, too, does the state court's specific reference to the majority vote requirement (Miss. Code Ann. § 37-7-217 (Supp. 1981))—the aspect of the voting procedure around which the Section 5 challenge

centered—which strongly reinforces the conclusion that the state court dealt with and rejected the Voting Rights Act claim on its merits. Conversely, the court made no reference to any procedural default as a basis for its decision.

b. In any event, even if respondents' interpretation of the Mississippi Supreme Court's rulings is correct, the result they seek—dismissal of the writ of certiorari as improvidently granted—is not warranted here.

The failure of a litigant to comply with a state procedural rule forecloses this Court's review of a federal question only where application of the rule in the particular case serves a "substantial state interest." *Henry* v. *Mississippi*, 379 U.S. 443, 449 (1965). Otherwise, "giving effect to the [state] rule for its own sake 'would be to force resort to an arid ritual of meaningless form.' " *Ibid.*, quoting *Staub* v. *City of Baxley*, 355 U.S. 313, 320 (1958). Mississippi clearly has a legitimate interest in maintaining a rule against raising claims for the first time in petitions for rehearing to its supreme court—*viz.*, "the necessity for orderly procedure so that cases may be disposed of on one hearing rather than by piecemeal." *Rigdon* v. *General Box Co.*, 162 So.2d 863, 864 (Miss. 1964). As we show below, however, application of the rule to the facts of this case would be inappropriate.

Both the Mississippi prohibition against first raising an issue on a petition for rehearing and this Court's general refusal to hear federal questions not properly presented to the state courts are based on a waiver concept. *Michel* v. *Louisiana*, 350 U.S. 91, 99-100 (1955); *Parker* v. *Illinois*, 333 U.S. 571, 574-576 (1948); *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190, 194-195 (1925); *Rigdon* v. *General Box Co.*, 162 So.2d 863, 864 (Miss. 1964).[3]

---

[3]It is up to this Court, of course, to determine whether a waiver of federal rights in fact has occurred. *Parker* v. *Illinois*, *supra*, 333 U.S. at 574; *Central Union Telephone Co.* v. *Edwardsville*, *supra*, 269 U.S. at 194.

Such a waiver analysis is inapplicable to the present case, however, because, as even respondents seem to recognize (Br. 21), the federal rights involved here are not petitioners' to waive.

The Voting Rights Act does not confer rights upon a jurisdiction that seeks to enact or to administer voting changes. Rather, it secures to *all citizens* the right embodied in the Fifteenth Amendment to vote free from state-imposed racial discrimination. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 556 (1969); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Indeed, this Court has recognized that Section 5 took rights from, rather than granted rights to, the states and their political subdivisions. See *City of Rome* v. *United States*, 446 U.S. 156, 179-180 & n.15 (1980); *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 334. The rights secured by Section 5 thus do not belong to, and, hence, are not waivable by, petitioners.[4]

Moreover, the effect of coverage by Section 5 of the Voting Rights Act is to bar implementation of all voting changes that have not been precleared. *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 46 (1978); *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977) (per curiam). Mississippi can have no legitimate state interest in applying its procedural rule so as to permit the implementation of voting procedures that are unenforceable under federal law.

---

[4]The present case is distinguishable from *Wise* v. *Lipscomb*, 437 U.S. 535, 546-547 (White, J.), 549 (Powell, J.), 550 (Marshall, J., dissenting opinion) (1978), in which the Court declined to rule on a Section 5 claim that had been neither presented to nor ruled on by either of the lower federal courts. Here, by contrast, even if the Court does not accept our view that the Mississippi Supreme Court passed on the merits of the Voting Rights Act claim, that federal question *at least* was reached and resolved by the Chancery Court after the Mississippi Supreme Court's first remand to it, thus providing a basis for review by this Court.

3. Finally, respondents' only answer to the merits of petitioners' claim (Br. 22-31) is that questions arising under the Voting Rights Act are not cognizable in the state courts. Contrary to respondents' suggestion (Br. 25), their position finds no support in the language of the statute. Moreover, it is foreclosed by the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

The present case, which was instituted by respondents, did not seek a determination whether a voting change had a discriminatory purpose or effect, a determination that can be made only by the United States District Court for the District of Columbia or the Attorney General of the United States. *Perkins* v. *Matthews*, 400 U.S. 379, 384-385 (1971); 42 U.S.C. 1973c. Nor is this an "action under" Section 5, which the statute requires to be heard by a three-judge federal district court. *Allen* v. *State Board of Elections, supra*, 393 U.S. at 561; 42 U.S.C. 1973c. Rather, the present action was brought "under" the one person-one vote principle of the Fourteenth Amendment's Equal Protection Clause and "under" state law, specifically, Miss. Code Ann. § 37-7-203 (Supp. 1981). Section 5 of the Voting Rights Act was raised by petitioners only in response to that action. The state court's failure to take cognizance of the Voting Rights Act in these circumstances is violative of the Supremacy Clause.

The Supremacy Clause provides (U.S. Constitution, Article VI, Clause 2; emphasis added) that "the laws of the United States which shall be made in Pursuance [of the Constitution[5]] * * * shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the*

---

[5]The constitutionality of Section 5 of the Voting Rights Act is well established. See *City of Rome* v. *United States*, 446 U.S. 156 (1980); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

Contrary notwithstanding." It is therefore well settled that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution" (*Hauenstein* v. *Lynham*, 100 U.S. 483, 490 (1879)), and that "[s]tate courts, like federal courts, have a constitutional obligation * * * to uphold federal law" (*Stone* v. *Powell*, 428 U.S. 465, 494 n.35 (1976)).

The federal law at issue here—Section 5 of the Voting Rights Act of 1965—does more than merely provide for the bringing of actions in federal court, as respondents suggest (Br. 24-27). It also renders unenforceable voting changes that have not been precleared. *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 46 (1978); *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977) (per curiam). Contrary to respondents' implication (Br. 24-27), the statute provides no exception for enforcement by state courts of unprecleared voting changes. Hence, the Mississippi Supreme Court erred in ordering the holding of an election pursuant to voting procedures that had not been precleared in accordance with Section 5 of the Voting Rights Act.

For the reasons stated above and in our opening brief, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

DOJ-1982-04